Katholieke Universiteit Leuven
Faculteit Rechtsgeleerdheid
Instituut voor Europees Recht

CITIZENSHIP OF THE UNION AS A CORNERSTONE OF EUROPEAN INTEGRATION

A Study of its Impact on Policies and Competences of the Member States

Proefschrift ingediend met het oog op het behalen van de graad van Doctor in de Rechten aan de Katholieke Universiteit Leuven

Thesis submitted with a view to obtaining the degree of Doctor in Laws at the Faculty of Law of the Katholieke Universiteit Leuven

Nathan Cambien

Promotor:
Prof. Dr. Koen Lenaerts

Leuven, 2011

TABLE OF CONTENTS

INTRODUCTION

CHAPTER 1 INTRODUCTION

I OPENING REMARKS: UNION CITIZENSHIP AND EUROPEAN INTEGRATION

"*Why then European citizenship? Because it can provide a model for democratic participation and freedom of movement beyond the borders of states. This should be attractive in a world whose greatest problems cannot be addressed by national governments acting independently of each other.*"[1]

Citizenship of the Union – or Union citizenship, as I will mostly refer to it throughout this dissertation – is a fascinating concept. The idea of creating a European form of citizenship besides and above our national citizenship is both revolutionary, exciting, but at the same time somewhat frightening. Not surprisingly, it has commanded a vast amount of literature from scholars of differing disciplines, including well know lawyers, sociologists and philosophers such as Jürgen Habermas, to name just one.[2]

Whereas Union citizenship was in its initial years of existence often considered to be a hollow concept of a mere symbolic value, it has in the last decade gradually developed into one of the most dynamic concepts of Union law. The growing importance of Union citizenship is witnessed, for instance, by the creation in 2010 of the post of "European Commissioner for Justice, Fundamental Rights and Citizenship" and by the great many high profile judgments rendered in the area of Union citizenship in recent years. The provisions on Union citizenship are now frequently relied on by Union institutions and individuals alike in a vast array of fields, even in competence areas traditionally thought to fall outside the scope of Union law. All this illustrates the potential of Union citizenship as a tool for European integration.

At the same time, it cannot go unnoticed that the development of Union citizenship does not always run smoothly. Recent cases on Union citizenship see the intervention of an increasing number of Member States who vehemently argue before the Court in favour of a restrictive interpretation of the citizenship provisions. Some of these cases even receive a significant amount of attention in popular press, with commentators sometimes strongly attacking the – perceived – perverse effects of Union citizenship. The reason for these counter-reactions is invariably the influence exerted by Union law through the provisions on Union citizenship on key areas of Member State competence. The implementation of the Union citizenship concept often creates tensions in these areas with certain legitimate interests of the Member States, such as the need to preserve a balanced social system and the desire to preserve

---

1 Bauböck, "Why European Citizenship? Normative Approaches to Supranational Union" (2007) *Theoretical Inquiries in Law*, 488.

2 Habermas, "The European nation state. Its achievements and its limitations: on the past and future of sovereignty and citizenship", (1996) *Ratio Juris*, 125-137. For an interesting account of the different angles and disciplines found in the literature on Union citizenship, see Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in Craig and De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011), 580-583.

national political sovereignty.[3] These tensions can cause a strain on the development of the full potential of Union citizenship.

This Ph.D. dissertation – entitled "Citizenship of the Union as a cornerstone of European integration: a study of its impact on policies and competences of the Member States" – examines, from a legal perspective, the extent to which the provisions on Union citizenship can bring an actual contribution to the European integration process. This analysis is firmly situated against the background of the tensions described between the potential contribution of Union citizenship to European integration, on the one hand, and its impact on certain key policies and competences of the Member States, on the other hand – or, with some measure of generalisation, the tension between European integration and national sovereignty. The dissertation is intended to determine more clearly to what extent the provisions on Union citizenship have an impact on the policies and competences of the Member States and how this impact can best be reconciled with the Member States' key interests. Accordingly, two fundamental questions are addressed. On the one hand, I will examine the present state of the Union citizenship *acquis* and evaluate whether it is satisfactory. On the other hand, I will examine *de lege ferenda* how a better balance can be achieved between the *effet utile* of the Union citizenship provisions and the competences of the Member States.

II SUBJECTS COVERED AND STRUCTURE

It would, of course, be virtually impossible to study this subject in its totality, given the vast size of the Member States' competences and policies affected. Therefore, I have limited my analysis to just two aspects of Union citizenship, namely the personal scope of Union citizenship, on the one hand, and the free movement of Union citizens and their family members, on the other hand. My choice for these particular two aspects of Union citizenship rests on three main reasons. First, these aspects can without much hesitation be labelled as two of the most fundamental aspects of Union citizenship. There can logically be no Union citizenship before it is determined who is a Union citizen and who can, therefore, enjoy the rights attached to that status. The right to free movement for Union citizens and their family members, for its part, has often been earmarked as the most important right attached to Union citizenship. At the same time, the strong focus of the citizenship provisions on free movement and its continued relevance has been the subject of some of the most important debates concerning Union citizenship in recent times. Second, the two aspects mentioned are two of the most controversial aspects of Union citizenship, given their potentially profound impact on two of the most significant competences of sovereign States, namely the competence to regulate nationality and the competence to regulate immigration. The need for a satisfactory balance between Union citizenship and its impact on the key interests of the Member States is perhaps most strongly felt in these fields. Third, the two aspects mentioned are two of the most dynamic aspects of Union citizenship. In recent years high profile cases judgments been rendered on both aspects which have completely changed the traditional understanding of the legal regime surrounding Union citizenship in these fields. For this reason too, it is most appropriate to focus the evaluation of the current legal framework and the examination of the way to achieve an appropriate balance between Union citizenship and Member State competences on these particular aspects of Union citizenship.

---

[3] Admittedly, these tensions are stronger in some Member States than in others. See the interesting contributions in Walker (ed.), *Sovereignty in Transition* (Oxford and Portland, Hart Publishing, 2003), 556 pp.

The structure of my dissertation neatly follows the two fundamental aspects of Union citizenship covered, namely the personal scope of Union citizenship (Part I) and the free movement of Union citizens (Part II). Each part consists of a more general chapter (Chapters 2 and 4) and a chapter dealing with a more specific related issue (Chapters 3 and 5).

A. Part I Personal scope of Union citizenship

Part I of the dissertation discusses the personal scope of Union citizenship by tackling a number of fundamental questions. On a more general level, the question will be answered who is a Union citizen and who is not. More important still is the related question of who is competent to lay down the rules governing the conferral and loss of Union citizenship, namely the Union or the Member States. This, in turn, will allow an analysis of the extent to which the application of the rules governing the personal scope of Union citizenship has an impact on the competences and policies of the Member States and thus the extent to which Union citizenship can be a real factor of European integration.

Chapter 2 analyses the legal regime surrounding the determination of the personal scope of Union citizenship. It starts from the traditional assumption that the Member States are exclusively competent to determine this scope, on account of their competence to regulate nationality, and examines to what extent this traditional assumption must be discarded in view of the provisions on Union citizenship. In this connection it is examined in depth precisely how Union law limits the competence of the Member States in this regard, both directly and indirectly, and what the consequences are for the Member States' nationality policies. Besides, the Chapter reflects on likely and desirable evolutions regarding the legal framework governing the determination of the personal scope of Union citizenship.

Chapter 3 examines the specific situation of Member State nationals resident in the Overseas Countries and Territories (OCTs), a topic which had until recently been given sparse attention only in legal literature. The Chapter examines whether OCT nationals having the nationality of a Member State should be considered full-blown Union citizens, and should fully enjoy the rights associated with that status, given the limited applicability *ratione loci* of Union law in the OCTs. For that purpose it analyses both the constitutional structure and nationality laws of the four Member States possessing OCTs and the consequences of the particular status of the OCTs and their residents for the application of the provisions on Union citizenship. In this context it is also examined to what extent the provisions on Union citizenship can function as a catalyst for integrating the OCTs and their residents in the European Union.

B. Part II Free movement of Union citizens

Part II of the dissertation analyses the right of free movement and residence of Union citizens and their family members, focussing on the rights enjoyed by non-EU family members and the restrictive conditions surrounding these rights. It examines how and to what extent the requirements deriving from the implementation of this right can be reconciled with the legitimate interest of the Member State in adopting and maintaining an effective immigration policy.

Chapter 4 examines the elements that determine the applicability of the provisions on Union citizenship and of those relating to family reunification in particular. It examines first of all

what kind of "movement" between Member States is required in order to trigger the applicability of the right for Union citizens to be joined or accompanied by family members. The deeper underlying question concerns the continued relevance of free movement for the application of the Union citizenship provisions. In this connection, a detailed study is undertaken of recent case law in which the Court appears to partially discard the traditional movement rationale. The underlying justifications of the case law are evaluated in light of its consequences for the *effet utile* of the provisions on Union citizenship, on the one hand, and its impact on the immigration policies of the Member States, on the other hand. This, in turn, will be the basis for proposals relating to the desirable evolution of the Union legal framework on this point.

Chapter 5 analyses the right of Union citizens to be joined or accompanied by family members in the host Member State in accordance with Directive 2004/38 and focuses in this connection on ascendants of Union citizens. It critically analyses the interpretation given to this category of family members and to the restrictive conditions surrounding their residence rights and assesses whether it strikes a proper balance between guaranteeing the freedom of movement of Union citizens and their family members and the interests of the Member States. In this connection, particular attention is paid to a recent line of cases in which certain of the said restrictive conditions were left unapplied in favour of the "primary carer" of Union citizens. The analysis of this case law forms the starting point for more fundamental observations about the interplay between the Union judicial and political institutions in the development of Union citizenship and the promotion of its role as a cornerstone of European integration.

III METHODOLOGY

The traditional legal method has been used for the research carried out for this Ph.D. dissertation. Accordingly, the legal sources relied on are the basic Union Treaties, secondary Union legislation, the case law of the Union Courts and policy documents of the Union institutions. Besides, great use has been made of the (sometimes abundant) legal literature on the subjects covered, in the form of books, book chapters, journal articles and case notes. The majority of the *doctrine* referred to consists of English language sources. This is based on a conscious choice. English language sources are often of a virtually unrivalled quality and depth[4] and, given the status of English as a *de facto* academic *lingua franca*,[5] they have the additional advantage of offering a broader range of perspectives presented by authors from different Member States[6] and even from countries outside the EU.[7] Nevertheless, other

4 This is the case, in particular, for renowned English language legal journals such as the *Common Market Law Review*, the *European Law Journal* and the *European Law Review.*

5 See Arnull, "The Americanization of EU Law Scholarship", in Arnull, Eeckhout and Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford, Oxford University Press, 2008), 416.

6 This assumption is borne out by a study by De Witte in which different EU law journals are compared in terms of the country of affiliation of their contributors. English language journals appear to be by far the most "international" in this regard, when compared to EU law journals in other languages. See de Witte, "European Union Law: A Unified Academic Discipline?" (2008) *EUI Working Paper RSCAS 2008/34, available at* http://cadmus.eui.eu/handle/1814/10028.

7 The *Columbia Journal of European Law*, for instance, is based in the US and frequently contains articles by American scholars. For another example of a scholarly work on EU law written by authors from a third country, see Harvey and Longo, *European Union Law: An Australian View* (Chatswood, LexisNexis Butterworths, 2008), 242 pp.

language sources have not been neglected and are also regularly referred to throughout this dissertation. This is true, in particular, for sources in the Dutch[8] and French language and, to a minor extent, for sources in German or Spanish.[9]

The most important source by far, apart from academic legal literature, is the case law of the ECJ. The ECJ can be credited with putting "flesh on the bones of Union citizenship"[10] and transforming it into a dynamic and powerful concept with a strong added value. It can with reason be said to be the driving force behind the development of Union citizenship into a real factor of European integration. This explains the heavy reliance on ECJ case law in this dissertation. My analysis often starts with a description of the case law in order to explain the current legal framework, but the case law will equally be a starting point to evaluate the present stance of the law and examine what the likely and desirable developments would be *de lege ferenda*. In this connection, it must be remarked that Union citizenship is a very dynamic field, in which prior *status quos* have been frequently known to be radically changed by later cases. For this reason, much importance is also attributed to Opinions of Advocates General. Although such Opinions do not have legally binding force, they are of a high authoritative value and often contain a more elaborate and sometimes more revolutionary reasoning than ECJ judgments, thereby often providing a conceptual framework for future developments.[11]

The analysis carried out in this dissertation is not limited to Union law, strictly speaking. Union law does not operate in a vacuum, but has its place in a wide spectrum of legal systems, which are increasingly interconnected. For this reason, the solutions adopted under Union law will at times be compared with, contrasted to or evaluated against the applicable regime under general international law. Besides, the research carried out would be incomplete without due consideration of the ECHR[12] and the case law of the ECtHR,[13] in particular given the fact that fundamental rights rank amongst the most vital rights enjoyed by Union citizens. Finally, because the research is firmly situated against the background of tensions between the Union level and the national level, the national provisions of a number of Member States will also be studied with regard to specific points. Indeed, a study of the national legal framework surrounding Union citizenship helps to identify the difficulties inherent in the existing state of the Union citizenship *acquis* and can be an inspirational ground for future legal solutions. Still, it must be emphasised from the outset that this

---

8 A prominent Dutch language source is the Dutch journal "Sociaal-Economische Wetgeving: Tijdschrift voor Europees en Economisch Recht", which is one of the oldest continuing legal journals specialised in EU law.

9 Legal literature in most other languages will necessarily be excluded, given my limited knowledge of these languages.

10 Expression borrowed from O'Leary, "Putting Flesh on the Bones of European Union Citizenship" (1999) 24 *E.L. Rev.*, 68-79.

11 See, on the role of Advocates General and their influence on the judgments of the ECJ, Burrows and Greaves *The Advocate General and EC Law* (Oxford, Oxford University Press, 2007), 317 pp. (see, in particular, Chapter10, devoted to Union citizenship). See also the classic contribution on the subject by Tridimas: Tridimas, "The Role of the Advocate General in the Development of Community Law: Some Reflections" (1997) 34 *CML Rev.*, 1349-1387.

12 The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR") was concluded under the auspices of the Council of Europe, an international organisation with, at the time of the writing, 47 member countries, among which are all the EU Member States. For its website, see www.coe.int/.

13 The European Court of Human Rights ("ECtHR") was set up in 1959 and has its seat in Strasbourg. It rules, in last resort, on applications alleging violations of the fundamental rights set out in the ECHR. For its website, see www.echr.coe.int/echr/.

dissertation approaches the subjects studied from a Union law perspective. Accordingly, national law will be referred to *in function of* the analysis of the Union legal framework. It logically follows that only some national systems will be studied in the context of this dissertation and in a rather fragmented way only.

PART I

PERSONAL SCOPE OF APPLICATION

CHAPTER 2 DETERMINATION OF THE PERSONAL SCOPE OF UNION CITIZENSHIP

I INTRODUCTION

Article 20(1) TFEU states: "Every person holding the nationality of a Member State shall be a citizen of the Union".[1] Similarly, Article 9(1) TEU states: "Every national of a Member State shall be a citizen of the Union".[2] Consequently, the personal scope of Union citizenship is determined by reference to the nationality of the Member States. If a person acquires the nationality of a Member State, he or she automatically becomes a Union citizen. Conversely, loss of the nationality of a Member State would seem to entail loss of Union citizenship. The question I will try to answer in this chapter is which level of government is competent to determine the conditions for acquisition and loss of the nationality of a Member State, and hence to determine the personal scope of Union citizenship. To answer this question, I will first briefly analyse the traditional position under international law regarding competence to determine the nationality of a State. Next I will consider the particular situation within the framework of Union law, having regard to the provisions on Union citizenship. It will be shown that under international law the Member States are competent to determine nationality and that the introduction of Union citizenship *prima facie* did not change this traditional position. However, it will also be demonstrated that, on a closer look, Union law, through the concept of Union citizenship, significantly influences the competence of the Member States in this connection, both indirectly and through direct limitations.

II TRADITIONAL POSITION UNDER PUBLIC INTERNATIONAL LAW

---

1 Article 20(1) TFEU replaced Article 17(1) TFEU, which contained in its first sentence the same definition. The European Parliament already used this definition in its Declaration of fundamental rights and freedoms of 12 April 1989, [1989] O.J. C120/51, Article 25(3) of which states that a Community citizen shall be "any person possessing the nationality of one of the Member States".

2 This article, which figures under Title II of the TEU on "Democratic Principles", was introduced by the Lisbon Treaty. The full Article states: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship". It is rather odd that the Treaties contain the same definition (although in slightly different wording) of Union citizenship in two different provisions. To my knowledge this is the only example of a duplication in the Treaties. Jo Shaw has described it as "obviously clumsy", but at the same time inevitable, "given what the parliamentarians saw as a severe threat to the status of citizenship if it was not mentioned in terms in the TEU itself" (Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in Craig and De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011), 599). In any event, Article 20(1) TFEU in my view remains the main provision for determining the personal scope of Union citizenship, because it is the provision that was added by the Maastricht Treaty, which introduced the provisions on Union citizenship and because of its location under Part Two of the TFEU titled "Non-discrimination and citizenship of the Union" (see, in this sense, also de Waele, "EU Citizenship: Revisting its Meaning, Place and Potential" (2010) 12 *Eur. J. Migration & L.*, 320-321). Consequently, Article 9 TEU is not central to my analysis in this chapter and will only be referred to sporadically.

It is a basic principle of international law that it is for States to determine who is to have their nationality and who is not.[3] The determination of nationality is traditionally one of the strong prerogatives of every sovereign State,[4] and this is confirmed both by international conventions, like the 1930 Hague Convention,[5] and in the case law of the International Court of Justice.[6] At the same time, it is important to stress that States are, when exercising this competence, subject to a number of important rules deriving from international law. These rules limit the effects to be given to a domestic determination of nationality under international law. It would be wrong, therefore, to confine the determination of nationality completely to the reserved domain of competence of sovereign States. The right way to put it is probably that nationality in principle has two aspects, both a national one and an international one:[7] States can autonomously lay down the rules on acquisition of their nationality, and determine the effects flowing from it in their domestic legal order, but in order for this conferral of nationality to have effect with regard to other States it will have to comply with certain rules of international law.[8]

In the following I will discuss two limitations to the competence of sovereign States to determine nationality: a general limitation deriving from international law, on the one hand (A) and further conventional limitations, on the other hand (B). They will be discussed only briefly here, but considered in more detail below, when considering to what extent they can play a role within the European Union, taking into account the particular nature of Union citizenship.

A. General limitation

---

3 See *e.g.* Brownlie *Principles of Public International Law* (7th ed.) (Oxford, Oxford University Press, 2008), 383; Hailbronner, "Nationality in Public International Law and European Law", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses* (Amsterdam, Amsterdam University Press, 2006), 35, at 52; Bossuyt and Wouters *Grondlijnen van internationaal recht* (Antwerp, Intersentia, 2005), 310; Shaw *International Law* (6th ed.) (Cambridge, Cambridge University Press, 2008), 660; Makarov *Allgemeine Lehren des Staatsangehörigkeitsrecht* (Stuttgart, Kohlhammer, 1962), 57.

4 According to Jessurun d' Oliveira it belongs to the "hard core of the identity and independence of the States" (Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 410-412).

5 Hague Convention concerning Certain Questions relating to the Conflict of Nationality Laws, League of Nations Treaty Series (LNTS) vol. 179; also published in *The American Journal of International Law*, Vol. 24, No. 3, Supplement: Official Documents (Jul., 1930), pp. 192-200. Article 1 of the Convention states: "It is for each state to determine under its own law who are its nationals." The Convention entered into force on 1 July 1937, having been ratified by 19 States. 27 States signed but did not ratify.

6 See ICJ, *Nationality Decrees in Tunis and Morocco* [1923] PCIJ, Series B, No. 4, 24: "The question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question…in the present state of international law, questions of nationality are, in the opinion of this court, in principle within this reserved domain".

7 See Brownlie *Principles of Public International Law* (7th ed.) (Oxford, Oxford University Press, 2008), 384-385.

8 The fact that nationality has two aspects also clearly surfaces in the *Nottebohm* case (ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ Reports 4), where the ICJ states: "The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its *domestic jurisdiction*. The question to be decided is whether that act has the *international effect* here under consideration." See also the replies of the German and the British government to the Hague Codification Conference (League of Nations, Conference for the Codification of International Law, Bases of Discussion, I, Nationality (1929), V.I.13 and 17, 169.

As pointed out above, Article 1 of the Hague Convention states that it is for each State to determine under its own law who are its nationals. However, that article adds:

> "This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."[9]

This principle is, for obvious reasons, only directly binding on State-parties to the Convention. Arguably however it also forms a principle of customary international law, and therefore also binding upon States not party to the convention.[10] The bottom-line is that, under international law, States only have to recognize the nationality of another State where it was granted with due respect to certain rules or principles deriving from international law.

The most famous illustration of this principle is without any doubt to be found in the *Nottebohm*[11] case. In that case, the ICJ stated:

> "…nationality is a legal bond having as its basis a social fact of attachment, a *genuine connection* of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred […] is in fact more closely connected with the population of the State conferring nationality than with that of any other State."[12]

This led the ICJ to observe that if a State granted its nationality to a person lacking any genuine connection with that State, this grant was "without regard to the concept of nationality adopted in international relations".[13] It followed that a State could not extend its diplomatic protection to such a person vis-à-vis a third State. In the words of the ICJ:

> "…a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."[14]

---

9 See also European Convention on Nationality, [1997] ETS No. 166, Article 3 of which provides: "1. Each State shall determine under its own law who are its nationals. 2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality."

10 See De Groot, "Naar een harmonisatie van het nationaliteitsrecht in Europa?", in X (ed.), *Het plezier van de rechtsvergelijking: opstellen over unificatie en harmonisatie van het recht in Europa* (Deventer, Kluwer, 2003), 67; Dehousse, Garcia Martines, Thiry and Volpi *Droit international public, Tome II: Les acteurs de la société internationale* (Liège, Editions de l'Université de Liège, 2005), 83. At the same time, it must be remarked that Article 18 of the Hague Convention explicitly states that the inclusion of the principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.

11 ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ Reports 4. For a discussion, see Kunz, "The Nottebohm Judgment" (1960) 54 *Am. J. Int. L.*, 536-571; Jones, "The Nottebohm Case" (1956) 5 *Int'l & Comp. L.Q.*, 230-244; Glazer, "Affaire Nottebohm (Liechtenstein v. Guatemala)--A Critique" (1955-1956) 44 *Geo. L.J.*, 314-325.

12 *Nottebohm*, at p. 23 (italics added). Brownlie has remarked that, even before the *Nottebohm Case* there was already substantial evidence for the doctrine of effective link (genuine connection): Brownlie, "The Place of the Individual in International Law " (1964) 50 *Va. L. Rev.* 435, at 441.

13 *Nottebohm*, at p. 26.

14 *Nottebohm*, at p. 23. In this connection, the Court explicitly referred to Article 1 of the Hague Convention (see n. 5, *supra*).

It would seem to follow that *under international law* States can only extend their nationality to persons having a genuine connection[15] with them.[16] In the absence of such a genuine connection, other States do not have to recognise their grant of nationality. However, it must immediately be added that it is not sure that such a broad principle can be derived from the *Nottebohm* case, as some authors have pointed out.[17] For instance, the ILC Draft Articles on Diplomatic Protection[18] do not require the establishment of a genuine connection as a requirement of nationality. The Commentary to these articles explains that the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, and that the ICJ in that case did not intend to expound a general rule applicable to all States. It remains to be considered therefore whether, in the context of the European Union, the *Nottebohm* principle can be said to be of general application. I will answer this question below.[19]

B. Conventional limitations

States can further limit their competence to determine nationality by concluding international agreements regarding nationality law.[20] The most important one is probably the Hague Convention of 1930,[21] Article 1 of which has already been mentioned. Another example is provided by international conventions on the reduction of statelessness, in particular the United Nations Convention on the Reduction of Statelessness.[22] Within Europe, mention must be made of the European Convention on Nationality ("ECN"), concluded under the auspices of the Council of Europe.[23] One of the aims of this convention is to create more uniformity in matters relating to nationality.[24] To this aim, it establishes principles and rules

---

15 I will not make the distinction sometimes made between a "genuine connection" and an "effective link" and treat both concepts as aspects of the same requirement, namely that of a certain connection between an individual and a State, without further elaborating on the exact meaning of these concepts under international law as such is not crucial to my analysis. For a more detailed discussion, see Brownlie *Principles of Public International Law* (7th ed.) (Oxford, Oxford University Press, 2008), 399 *et seq.* For a recent critical discussion of the "genuine connection" doctrine, see Sloane, "Breaking the genuine link: the contemporary international legal regulation of nationality" (2009) *Harv. Int'l L;J.* 1-60.

16 An interesting parallel can be drawn with the "nationality" of vessels. Article 91(1) of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 ('UNCLOS') and approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998, [1998] O.J. L179/1 states "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a *genuine link* between the State and the ship." This provision lacks direct effect; see ECJ, Case C-308/06 *Intertanko* [2008] E.C.R. I-4057, para. 65.

17 De Groot, "Naar een harmonisatie van het nationaliteitsrecht in Europa?", in X (ed.), *Het plezier van de rechtsvergelijking: opstellen over unificatie en harmonisatie van het recht in Europa* (Deventer, Kluwer, 2003), 70; Shaw *International Law* (6th ed.) (Cambridge, Cambridge University Press, 2008), 813-814.

18 ILC Draft articles on Diplomatic Protection, adopted during the 58th session, in 2006, Article 4.

19 See under IV.A., *infra*.

20 See Hailbronner and Renner *Staatsangehörigkeitsrecht* (München, Beck, 2005), 51 *et seq.*

21 See n. 5, *supra.*

22 989 UNTS 175. 13 Member States have ratified the Convention, whereas France has only signed it: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/treaty4.asp.

23 European Convention on Nationality, [1997] ETS No. 166. See, in great detail: De Groot, "The European Convention on Nationality: A Step Towards a Ius Commune in the Field of Nationality Law" (2000) 7 *MJ*, 117-157; Hall, "The European Convention on Nationality and the Right to Have Rights" (1999) 24 *E.L. Rev.*, 586-602.

24 According to its preamble, the signatory states to the Convention are: "Desiring to promote the progressive development of legal principles concerning nationality, as well as their adoption in internal law and desiring to avoid, as far as possible, cases of statelessness".

relating to the nationality of natural persons to which the internal law of States Parties has to conform (Article 1). It follows that signatory States voluntarily limit their sovereignty with regard to nationality in order to secure more uniformity within Europe. Especially important are the "general principles relating to nationality" (Articles 3-5), to which no reservations may be made (Article 29(1)). The Convention is obviously only applicable in States which have ratified the Convention. At present, this includes only 12 of the EU Member States.[25] However, as De Groot[26] argues, the principles contained in Articles 3-5 could possibly become binding as customary international law. The role of the ECN in the EU will be discussed in more detail below.[27]

III IMPACT OF THE INTRODUCTION OF UNION CITIZENSHIP

A. Member States remain competent to regulate nationality

Under this heading, I will consider if, and to what extent, the introduction of Union citizenship has changed anything for the Member States of the European Union with regard to the traditional principle of international law that Sovereign States are competent to determine nationality, be it within certain limitations deriving from international law. It has already been noted that the status of Union citizenship depends first and foremost on having the nationality of a Member State. One could be forgiven for thinking that, in parallel with the introduction of Union citizenship, some common rules or principles on the determination of Member State nationality would have been introduced at the level of the EU. Given the important rights deriving from the status of Union citizenship, one could have expected the EU to intervene with regard to the conferral of this status. Such rules or principles would have served to circumscribe the competence of the Member State to confer or withdraw their nationality in order to better guarantee the effect of the provisions on Union citizenship, by not making its scope fully subject to the will of the Member States. Yet, an analysis of the Treaty provisions (1) and the case law of the Union courts (2) shows that the determination of nationality has remained fully within the competence of the Member States.[28] This is also confirmed by the fact that Member States can make unilateral declarations on the definition of their nationals for the purposes of Union law, which are binding for the other Member States (3).

1. Treaty provisions

---

25 Being Austria, Bulgaria, the Czech Republic, Denmark, Finland Germany, Hungary, the Netherlands, Portugal, Romania, Slovakia and Sweden. See: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=166&CM=&DF=&CL=ENG.

26 De Groot, "Naar een harmonisatie van het nationaliteitsrecht in Europa?", in X (ed.), *Het plezier van de rechtsvergelijking: opstellen over unificatie en harmonisatie van het recht in Europa* (Deventer, Kluwer, 2003), 71.

27 See under V.C.2., *infra*.

28 In the sense that neither the Union legislator nor the Union Courts have formulated (minimum) rules or principles regarding the determination or definition of the nationality of the Member States. It should not be taken to mean that Union law does not have any influence on the competence of the Member States in this connection (see the discussion under Titles III and IV, *infra*).

The provisions on Union citizenship were introduced with the Maastricht Treaty.[29] It is clear from the political climate and the negotiations surrounding the Maastricht Treaty that the EU Member States wanted to fully preserve their power as sovereign States to determine nationality. They were clearly not prepared to transfer this competence to the Union. This can probably be explained by a certain fear on part of the Member States of losing an important part of their sovereignty.[30] Handoll has remarked in this regard that "to transfer the power to determine nationality to the [Union] would, perhaps more than the transfer of any other power, sound the death-knell of the Member State *qua* independent State".[31] To take away any possible doubt in this regard it was firmly stated in a declaration annexed to the Maastricht Treaty that:

> "The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned[32]".

Some Member States were clearly concerned that Union citizenship would compete with or even dominate Member State nationality. Precisely for this reason it was agreed that the personal scope of Union citizenship was to be determined by reference to the nationality of the Member States (see Article 20(1) TFEU). This allows the Member States, *prima facie* at least, to retain control over the status of Union citizen. Apparently, some Member States even feared that original Article 8(1) TEC[33] (later Article 17(1) TEC; present Article 20(1) TFEU) did not stress clearly enough the autonomy of Member State nationality. For this reason the Treaty of Amsterdam[34] added a second sentence to Article 17(1) TEC, reading "Citizenship of the Union complements and does not replace national citizenship".[35] The Treaty of Lisbon changed this sentence into "Citizenship of the Union shall be additional to and not replace national citizenship" (Article 20(1) TFEU).[36] The aim of this rewording is probably to express even more clearly the idea that Union citizenship leaves the competence of the Member States regarding nationality untouched, at least as a matter of principle. It could be understood as stating that Union citizenship must not be seen as in some way transforming the nationality of the Member States (by "complementing it and hence transforming its nature"),

---

29 For a detailed discussion, see Kovar and Simon, "La citoyenneté européenne" (1993) *C.D.E.*, 285-316.

30 The same concern is apparent from a number of other provisions introduced by the Maastricht Treaty. Note, for instance, the insistence of the Member States on the respect for the national identities of Member States (Article 6(3) TEU) and on the fact that the powers of the European Union are limited (introduction of the principle of subsidiarity; Article 5, second para., TEC [*now Article 5(3) TEU*]).

31 Handoll *Free Movement of Persons in the EU* (Chichester, John Wiley & Sons, 1995), 283. Jessurun d'Oliveira for his part, has pointed out that nationality is central to the existence of Member States: see Jessurun d'Oliveira, "European Citizenship: Its Meaning, Its Potential", in Monar, Ungerer and Wessels (eds.), *The Maastricht Treaty on European Union* (Brussels, European University Press, 1993), 85.

32 Declaration (No 2) on nationality of a Member State, annexed to the Treaty on European Union, [1992] O.J. C191/98.

33 As introduced by the Maastricht Treaty: Treaty on European Union, [1992] O.J. C191. Article 8(1) read: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union".

34 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, [1997] O.J. C340.

35 The Treaty of Amsterdam added this provision so as to make it absolutely clear that Union citizenship is complementary. See also Closa, "Citizenship of the Union and Nationality of Member States" (1995) 32 *CML Rev.*, 487-518.

36 The same sentence also figures in Article 9 TEU (see my comments in n. 2, *supra*). See also the similarly worded Article I-10(1), second sentence, of the Treaty establishing a Constitution for Europe.

but as a concept separate from that of Member State nationality.[37] This is also clear from the French version of the Treaties, in which the word "complète" is replaced with "s'ajoute à", and perhaps even more clear from the Dutch version, in which the expression "vult het nationale burgerschap aan" is replaced with "komt naast het nationale burgerschap". Another explanation that has been advanced for the changed wording is that the new wording better indicates that Member State nationality is to be the primary status of a person and Union citizenship a secondary, accessory status.[38] However, this explanation is clearly at odds with the case law of the ECJ, proclaiming that Union citizenship is "destined to be the fundamental status of nationals of the Member States".[39] In my view, the new wording accommodates this case law of the ECJ, since it describes Union citizenship as a full-blown additional fundamental status rather than an ancillary accessory status which merely complements Member State nationality.[40] As such the new wording confirms both the competence of the Member States regarding nationality and the fundamental status of Union citizenship.[41]

The concern for competing forms of citizenships has perhaps been given the clearest expression in the Danish declaration on citizenship of the Union on the occasion of the Danish ratification of the Maastricht Treaty,[42] part 1 of which states:

> "Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state. The question of Denmark participating in any such development does, therefore, not arise."

Remarkable in this regard is that the Treaty Article defining Union citizenship in the Danish version of the TFEU uses two times the word "borger(skab"),[43] and does not use the word "indfødsret", the Danish word for nationality used in the Danish Nationality Act. This may perhaps partly explain the Danish fear that the creation of Union citizenship could be the first

---

37 Schrauwen, "European Union citizenship in the Treaty of Lisbon: any change at all?" (2008) 1 *MJ,* 60. See also the discussion in Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in Craig and De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011), 598-600.

38 De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 2. This interpretation is also advanced by Konstadinides, who, rather curiously, argues that "additional" and "complementary" are synonymous, leaving one wondering why any change at all has occurred in the wording of the provision (Konstadinides, "La fraternite europeene? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship" (2010) 35 *E.L. Rev.*, 406).

39 ECJ, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. 31 and often reiterated in later cases: *e.g.* ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, para. 32; ECJ, Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] E.C.R. I-6849, para. 86; ECJ, Case C-50/06 *Commission v the Netherlands* [2007] E.C.R. I-4383, para. 32. See also recital 3 to Directive 2004/38 (n. 194, *infra*).

40 In this sense, de Waele, "EU Citizenship: Revisting its Meaning, Place and Potential" (2010) 12 *Eur. J. Migration & L.*, 322-323.

41 See, in this sense, Hailbronner, "Nationality in Public International Law and European Law", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses* (Amsterdam, Amsterdam University Press, 2006), 35, at 87.

42 Declaration on citizenship of the Union, to be associated to the Danish act of ratification of the Treaty on European Union, [1992] O.J. C348/1.

43 Article 20(1), second sentence, TFEU in the Danish language version reads: "Unionsborgerskab har enhver, der er statsborger i en Medlemsstat" (as did Article 8(1) of the Danish version of the TEC in its pre-Amsterdam version).

step towards the decline of their own (Danish) nationality.[44] Indeed, it may have conveyed the impression that Union citizenship is not defined with reference to or dependent on the Danish domestic nationality concept ("indfødsret"). This impression was, of course, not justified since the reference in the Treaty article to the nationality of a Member State undoubtedly referred to nationality as it was conceived of under the domestic laws of the different Member States.

In reaction to the Danish declaration, the Heads of State or Government, meeting in the European Council, issued the following statement:

> "The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned."[45]

This confirms the general principle contained in the Declaration on nationality.[46] It makes it explicit, moreover, that Union citizenship in no way encroaches on the powers of the Member State to regulate nationality. This is clearly intended to alleviate the fear of some Member States for competing forms of citizenship. However, it must not be overlooked that strictly speaking, the statement applies to Denmark only and not to other existing or acceding Member States.[47] Moreover, it must be pointed out that a declaration annexed to a final act, like the Declaration on nationality, nor a decision of the Heads of State or Government have the same legal force as the Treaties. At least one author considers, therefore, that these instruments are not sufficient to protect the Member States nationality legislation from being encroached upon by Union law and has called on the Member States to include a provision stating the exclusive competence of the Member States regarding nationality in the Treaties themselves.[48] This point will be extensively discussed below.[49]

2. Case law of the Union Courts

In the absence of common rules on Member State nationality, one could have expected the ECJ to have "Europeanised"[50] the concept of Member State nationality, like it has done, for

---

44 De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 4.

45 Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union, [1992] O.J. C348/1. For a discussion, see Curtin and van Ooik, "Denmark and the Edinburgh Summit: Maastricht without Tears", in O'Keeffe and Twomey, *Legal Issues of the Maastricht Treaty* (London, Chancery Law Publishing, 1994), 349-365; Curtin and van Ooik, "De bijzondere positie van Denemarken in de Europese Unie" (1993) *SEW*, 675-689. See also the Solemn Declaration of the Birmingham European Council, which states that "citizenship of the Union brings our citizens additional rights and protection without in any way taking the place of their national citizenship" (Declaration on a Community close to its citizens, Annex I Bull. EC 10-1992).

46 *Supra*, n. 32.

47 See the Conclusions of the Presidency of the European Council of 11 and 12 December 1992 ('Denmark and the Treaty on European Union'), [1992] O.J. C348/1.

48 Jessurun d'Oliveira, "Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de *Rottmann* zaak" (2010) *NJB*, 1028, at 1033 (commenting on the *Rottmann* judgment, in which the Court did consider that the said instruments cannot be interpreted as shielding the Member States' competence regarding nationality from the duty to respect Union law; see the discussion under V.A.2., *infra*).

49 See under V.B.1., *infra*.

50 See Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 396.

example, with the concept of "worker".[51] Just like "nationality of a Member State", the concept of "worker" was not expressly defined in the Treaties or in any provision of secondary legislation on the subject. Yet, the ECJ considered that the term "worker" has an independent Union meaning and may not be defined by reference to the national laws of the Member States, because otherwise:

> "the [Union] rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the [Union] institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the [Treaties]."[52]

Thus, the ECJ conferred on itself a "hermeneutic monopoly" to counteract possible unilateral restrictions of the applications of the rules on freedom of movement by the different Member States.[53]

One could point out that Union citizenship is considered by the Court to be the fundamental status of nationals of the Member States and that, just like the status of worker, it entails important rights under Union law, such as a fundamental right to free movement of Union citizens (Article 21 TFEU). One could argue that the aim of the provisions on Union citizenship would be frustrated if Member States could unilaterally restrict their application. That situation could arise if Member States remained exclusively competent to confer or withdraw their nationality, given that the status of Union citizen is defined wholly with regard to Member State nationality (Article 20(1) TFEU). Applying a similar reasoning to the one adopted by the Court in the *Levin* case, one could conclude that "nationality of a Member State" is to have an independent Union meaning, and must not be determined solely by reference to the laws of the Member States. Just to illustrate this possibility: the ECJ could have put forward the view that third country nationals are to be considered nationals of a Member State for the purposes of the provisions on Union citizenship after having legally resided for at least five years in the territory of the Member States. Yet the ECJ has never made such a bold move, and has repeatedly held that the determination of nationality remains a matter for the Member States, although at the same time qualifying this finding.[54]

There are probably good reasons for this. First of all, with regard to the provisions on Union citizenship there is less scope to argue that the basic terms were not defined in the Treaties or in legislation, to the difference of the provisions on free movement of workers. Union citizenship, the central concept we are concerned here with, is expressly defined in Article 20(1) TFEU. And with regard to nationality of the Member States, it clearly follows from the Declaration on nationality that Member State nationality is to be determined solely by

---

51 Other examples of concepts that were given an independent Union meaning are the terms "staying" and "resident" in the context of the Framework Decision on the European arrest warrant (see ECJ, Case C-66/08 *Kozłowski* [2008] E.C.R. I-6041, paras 41-43).

52 *E.g.* ECJ, Case 75/63 *Hoekstra* [1964] E.C.R. 177, 184; ECJ, Case 53/81 *Levin* [1982] E.C.R. 1035, para. 11 and numerous later cases (for recent examples, see: ECJ, Case C-228/07 *Petersen* [2008] E.C.R. I-6989, para. 45; ECJ, Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] E.C.R. I-4585, para. 26). The Court's approach has been fiercely criticized by O'Brien, who argues that this well established case law should be reviewed in the light of recent developments like the expanding case law on Union citizenship (O'Brien, "Social Blind Spots and Monocular Policy Making: the ECJ's Migrant Worker Model" (2009) 46 *CML Rev.*, 1107-1141).

53 Mancini, "The Free Movement of Workers in the Case-Law of the European Court of Justice", in Curtin and O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law* (London, Butterworths, 1992), 67.

54 In the sense that it has held that the Member States must exercise this competence with due regard to Union law (see the discussion under V.A., *infra*).

reference to the national law of the Member State concerned. Declarations annexed to a Final Act may not have the same legal force of the Treaties,[55] but the Declaration on nationality at the very least shows, just like other documents discussed above, the clear intention of the Member States that Member State nationality should not be considered as an autonomous Union concept.[56] The intention of the Masters of the Treaties is obviously an important element for the ECJ when interpreting Union law. It cannot without convincing reasons deny it.[57] The ECJ has recently confirmed that the Declaration on nationality (and the statement of the Heads of State or Government on this issue[58]) must be taken into account as being instruments for the interpretation of the Treaties, in particular for the purpose of determining the ambit *ratione personae* of the Treaties.[59] Besides, the above cited case law, holding that certain concepts are to have an independent Union meaning, explicitly states that this is the case only with regard to provisions of Union law "which make no express reference to the law of the Member States for the purpose of determining its meaning and scope".[60] This again, breaks down a possible parallel in the said case law with regard to Member State nationality.

Furthermore, as was set out above, it is a general principle of international law that sovereign States are competent to determine their nationality.[61] A similar principle obviously does not exist with regard to the concept of "worker". This too has clearly been a determining factor in the finding of the ECJ that Member States remain competent to determine nationality. Holding differently would probably have been seen by many Member States as an unacceptable encroachment on their sovereign powers. Besides, Union instruments have from early on restricted the application of Treaty provisions to workers who are nationals of the Member States.[62] Given that the ECJ did not find it necessary to give an autonomous Union meaning to "nationals of a Member State" in order to preserve the effectiveness of the provisions on free movement of workers, it is not immediately clear why it should find it necessary to do so when dealing with the provisions on Union citizenship. Nevertheless, I will argue below that the provisions on Union citizenship and the integration dynamics behind them do provide the Court with good arguments for treating the nationality rules of the

---

55 Toth, "The Legal Status of the Declarations Annexed to the Single European Act" (1986) *CML Rev*. 803, at 812.

56 See the discussion in O'Leary *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), 59-62.

57 See, in this connection, Article 31(2)(b) of the Vienna Convention of 23 May 1969 on the law of treaties, which for the purpose of interpreting a treaty considers its context to be, *inter alia*, any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. See also Opinion of AG Poiares Maduro in Case C-64/05 P *Sweden v Commission* [2007] E.C.R. I-11389, para. 34 and Schermers, "The Effect of the Date 31 December 1992" (1991) *CML Rev.* 275, at 276.

58 See n. 45, *supra*.

59 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 40.

60 The ECJ has on numerous occasions held that "it follows from the need for uniform application of [Union] law and from the principle of equality that the terms of a provision of [Union] law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the [Union], having regard to the context of the provision and the objective pursued by the legislation in question" (see, *e.g.*, ECJ, Case 327/82 *Ekro* [1984] E.C.R. 107, para. 11; ECJ, Case C-287/98 *Linster* [2000] E.C.R. I-6917, para. 43; ECJ, Case C-170/03 *Feron* [2005] E.C.R. I-2299, para. 26; ECJ, Case C-316/05 *Nokia* [2006] E.C.R. I-12083, para. 21; ECJ, Case C-66/08 *Kozłowski* [2008] E.C.R. I-6041, paras 41-43).

61 See the discussion under Title II*, supra*.

62 See, in particular, Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] J.O. L257/2.

Member States in certain circumstances as falling within the scope of Union law and for assessing their compliance with certain principles of Union law.[63]

3. Member State declarations on nationality

The conclusion from the foregoing must be that the Member States, and the Member States alone, are competent to determine who is a national, and that this remains true even after the introduction of the provisions on Union citizenship. Of great interest to note in this context is that the definition of a national for the purposes of Union citizenship can be different from the definition of nationals under the internal law of the Member State concerned. Indeed, the Declaration on nationality mentioned above[64] does not merely proclaim that nationality is to be determined by the Member States. It adds the following sentence:

> "Member States may declare, for information, who are to be considered their nationals for [Union] purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary."[65]

So far, only two Member States have made a declaration on the definition of nationals for Union purposes: the UK and Germany. It must immediately be pointed out however that both declarations date back to before the adoption of the Maastricht Treaty, and have not therefore been adopted pursuant to the said Declaration on nationality. The UK, on the one hand, made a unilateral declaration on nationality upon signing the *1972 Treaty of Accession.*[66] This declaration, which was reiterated in slightly different terms upon signing the Lisbon Treaty, will be discussed elsewhere.[67]

The German declaration,[68] on the other hand, was made at the time of the signature of the TEEC and TEAEC. It reads: "All Germans as defined in the Basic Law for the Federal Republic of Germany shall be considered nationals of the Federal Republic of Germany". This definition refers to Article 116 of the German Basic Law and is broader than the definition then found in the German Nationality Act 1913, because it includes ethnic Germans in Eastern Europe who entered Germany as refugees (*Vertriebene*).[69] Declarations to identical effect were made by Germany upon signing the 1979 Treaty of Accession and the 1985 Treaty of Accession. However, these declarations have become without practical relevance since 1 January 2000, the date of the entry into force of the revised German

---

63 See the discussion under V.B., *infra*.

64 *Supra*, n. 32.

65 Declaration (No 2) on nationality of a Member State, annexed to the Treaty on European Union, [1992] O.J. C191/98.

66 Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic the Italian Republic, The Grand Duchy of Luxembourg, the Kingdom of the Netherlands (Member States of the European Communities), The Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community [1972] O.J. L5/164.

67 See Chapter 3, under II.B.4., *infra*.

68 Declaration of 25 March 1957 by the government of the Federal Republic of Germany on the definition of the expression "German National". In the final act annexed to the TEEC, it is stated that the intergovernmental conference of the ministers of foreign affairs of the founding Member States took note of this declaration. For a discussion, see Bleckmann, "German Nationality Within the Meaning of the EEC Treaty" (1978) 15 *CML Rev.*, 435-446.

69 See Piotrowicz, "The Status of Germany in International Law: Deutschland über Deutschland?" 38 (1989) *I.C.L.Q.*, 609.

Nationality Act.[70] Indeed, anyone recognised as German within the meaning of Article 116 of the Basic Law now simultaneously acquires German nationality *ex lege* on the basis of the revised German Nationality Act.[71] It follows that the said declarations add nothing to the default situation, whereby "national of the Member State for Union purposes" would be determined with regard to the German nationality act. It is not opportune therefore to discuss these declarations in any detail here.

All the same, the aspect of these declarations that matters in this context is not so much their content, but rather their legal value, because this determines the power of the Member States to define nationality for the purposes of the application of, *inter alia*, the provisions on Union citizenship. It was not clear from the outset what legal value any of these declarations would have. Especially the expression "for information" in the Declaration on nationality raised doubts concerning their binding force. However, this issue has been clarified by the ECJ. In *Kaur*,[72] the ECJ firmly stated that declarations on the definition of nationals for Union purposes have an authoritative value with regard to the determination of the scope of the Treaties *ratione personae*.[73] In other words, these declarations determine, in a way that is binding for all Member States, who is to be considered a national of the Member State concerned for Union purposes.

This confirms once more that under Union law, the Member States are fully competent to regulate nationality. As such, Union law confirms the traditional principle of international law that States are sovereign in determining nationality. Moreover, it appears from the foregoing that Member States are competent to restrict the effects of their nationality at the Union level. This possibility has not been used so far – at least not since the introduction of Union citizenship. Still, it must be remarked that the possibility is increasingly being discussed in legal literature,[74] in particular since the recent *Rottmann* judgment which seems to have paved the way for greater intrusion of Union law in the field of nationality regulation.[75] In this connection, it is sometimes suggested that Member States could use the said possibility of submitting a declaration in order to shield certain contentious aspects of their nationality legislation from the influence of Union law. The argument has also been invoked in relation to the Member States' policies vis-à-vis the Overseas Countries and Territories (OCTs).[76] Since most OCT nationals are Union citizens, they can claim the rights attached to that status and this has recently given rise to disputes before the Union Courts, in particular in the famous *Eman and Sevinger* case.[77] In this connection it has been suggested

---

70 Law on the reform of the German citizenship law (*Staatsangehörigkeitsgesetz*) of 15 July 1999, Bundesgesetzblatt (*Federal Law Gazette*), vol. 1, 1618. For an overview of the historical development of German nationality law, see: Hailbronner, "Germany", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses* (Amsterdam, Amsterdam University Press, 2006), 217 *et seq*.

71 See: De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 8.

72 ECJ, Case C-192/99 *Kaur* [2001] E.C.R. I-1237, para. 24. See Hall, "Determining the Scope ratione personae of European Citizenship: Customary International Law Prevails for Now" (2001) 28 *LIEI*, 355-360.

73 See further the submissions of Spain in ECJ, Case C-145/04 *Spain v United Kingdom* [2006] E.C.R. I-7917, in which Spain uses the *Kaur* dictum to argue that the UK could not validly extend the right to vote and stand as a candidate in elections to the EP to "Qualifying Commonwealth Citizens".

74 See, *e.g.*, the discussion in Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights" (2009) 15 *Colum. J. Eur. L.*, 186-190.

75 See the detailed discussion under IV.A.2., *infra*.

76 See the detailed analysis in Chapter 3, *infra*.

77 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055.

that Member States could take such issues outside the reach of Union law by submitting a declaration to the effect that OCT nationals, while being Member State nationals under the internal law of the Member State concerned, are not "nationals" for Union purposes. I will come back to this argument in the framework of the detailed discussion in Chapter 3 on "OCTs and Union citizenship" (see III.C.1, in particular).

B. What role for Union law?

Even though within the framework of Union law Member States remain competent to determine the rules governing nationality, it is my view that they will not act completely autonomously in this regard. Through the concept of Union citizenship, Union law will exert a considerable influence over the Member States in this policy area. This influence can be rather indirect, in that the consequences Union citizenship attaches to the possession of Member State nationality, and the effect this has on other Member States, could bring a Member State to change its nationality legislation. But Union law arguably also sets direct limitations to the competence of the Member States regarding nationality. It must be remembered in this regard that already in 1992 the ECJ stated that "it is for each Member State, *having due regard to [Union] law*, to lay down the conditions for the acquisition and loss of nationality".[78]

In the following, I will consider, first, the indirect influence Union law may have on the competence of the Member States regarding nationality, by determining the effects to be given to Member State nationality in the framework of the provisions on Union citizenship (Title III). In this context I will make a distinction between the Member States' competence regarding acquisition of nationality, on the one hand, and regarding loss of nationality, on the other hand, because it would seem to be the case that the influence deriving from Union law may well be different depending on whether the first or the second is at stake. Next I will consider whether Union law also *directly* limits the Member States' competence in this regard (Title IV).[79] I will consider what principles of Union law could serve as such limitations and what consequences this may have for the nationality laws of the Member States.

IV INDIRECT INFLUENCE FLOWING FROM UNION CITIZENSHIP

[78] ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 10 (italics added). See the discussion under IV.A.1., *infra*.

[79] I will limit my analysis to the possible influence of Union law on the national laws of EU Member States. For a discussion of the influence Union law may have on *candidate Member States*, see: Kochenov, "EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic" (2007) 3 *Journal of Contemporary European Research*, 124-140; Kochenov, "Pre-accession, Naturalization, and 'Due Regard to Community Law': the European Union's 'Steering' of Citizenship Policies in Candidate Countries during the Fifth Enlargement" (2004) 4 *Romanian J. Pol. Sci.*, 71-97.

A. Acquisition of nationality

1. *Micheletti*[80] and the unconditional recognition of Member State nationality

This famous landmark case is about a dentist from Argentina, Mr. Micheletti, one of whose grandparents was Italian. According to Italian law, he therefore had the Italian nationality.[81] Mr. Micheletti wanted to establish himself in Spain, invoking his freedom of establishment as a national of a Member State (Article 44 TEC; now Article 50 TFEU). The Spanish authorities, however, refused to recognise him as an Italian national. They pointed out that according to the Spanish Civil Code in cases of dual nationality, where neither nationality was Spanish, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain was to take precedence.[82] In the case of Mr. Micheletti, this habitual residence corresponded to Argentina. Accordingly, he was to be considered as an Argentinean, and not an Italian national, and thus did not have the right to establish himself in Spain on the basis of the Treaty provisions on freedom of establishment.[83]

The ECJ found the decision of the Spanish authorities to be in breach of Union law. It famously stated that where one Member State had granted its nationality to someone, this had to be unconditionally accepted by all other Member States.[84] It was not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaties.[85] Hence, since Italy had chosen to bestow the Italian nationality on Mr. Micheletti, Spain had to unconditionally recognise this and treat him as an Italian national. It could not restrict the effects of the acquisition of Italian nationality by imposing an additional condition for taking that nationality into account, such as a condition of habitual residence in its territory.[86]

The ECJ's holding in *Micheletti* can be fruitfully contrasted with the traditional position in international law. As outlined above,[87] under international law, States do not have to unconditionally recognise the grant of nationality by another State. They may refuse to recognise an individual's nationality if it was granted contrary to international law.

---

80 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239. See the case note by Jessurun d'Oliveira in (1993) *CML Rev*., 623-637 and Ruzié in (1993) *R.G.D.I.P*., 107-120 and the analysis by Iglesias Buhigues, "Doble nacionalidad y derecho comunitario. A propósito del asunto C 369/90, Micheletti, sentencia del TJCE de 7 de Julio de 1992", in Perez Gonzalez and others (eds.), *Hacia un nuevo orden internacional y europeo. Homenaje al profesor M. Diéz de Velasco* (Madrid, Tecnos, 1993), 953-967.

81 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 2.

82 See Article 9.9., first subpara., of the *Código Civil* ("A los efectos de este capítulo, respecto de las situaciones de doble nacionalidad previstas en las Leyes españolas se estará a lo que determinen los tratados internacionales, y, si nada estableciesen, será preferida la nacionalidad coincidente con la última residencia habitual y, en su defecto, la última adquirida").

83 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, paras 4-5.

84 *Ibid.*, para. 10.

85 *Ibid.*, para. 10.

86 *Ibid.*, para. 10. It appears that Spain took up this obligation with much hesitance and discontent. According to De Groot, the Spanish Supreme Court (*Tribunal Supremo*) in the years following the *Micheletti* judgment kept interpreting Spanish nationality law vis-à-vis Argentinean-Italian nationals in a way contrary to the *Micheletti* judgment (De Groot, "Latin-American European Citizens: Some Consequences of the Autonomy of the Member States of the European Union in Nationality Matters (editorial)" (2002) 9 *MJ*118; De Groot, "Negeert Spanje de Micheletti-beslissing van het Europees Hof van Justitie?" (1998) *Migrantenrecht*, 123).

87 *Supra*, under II.

Moreover, in the case of a person having plural nationality, *i.e.* the nationality of two or more States, States may give preference to the so-called "real and effective nationality".[88] Union law on the other hand, as is clear from *Micheletti,* does not at all allow Member States to refuse to recognise nationality in the absence of a genuine connection[89] or because it was granted contrary to international law. A further difference with international law is that under the latter a State is allowed to treat a person having dual nationality including the nationality of that State as its own national, thereby "ignoring" the other nationality for certain purposes.[90] Union law, by contrast, does not seem to allow a Member State to treat one of its nationals who also possesses the nationality of another Member State as merely having its own nationality. In *Garcia Avello* the ECJ pointed out that the 1930 Hague Convention[91] does not impose an obligation but simply provides an option, in the case of dual nationality, for the contracting parties to give priority to their own nationality over any other.[92] It followed that the Hague Convention could not be relied upon by the Member States in the context of Union law to "ignore" the nationality of another Member State. The bottom-line seems to be that, within the context of the EU, Member States do not only have to unconditionally recognise the grant of nationality by another Member State, but also actively take it into account where it would have consequences under Union law.[93]

The ECJ is probably right in taking this approach. Any other approach would potentially undermine some of the basic philosophies underlying the creation of the EU. If Member States were allowed to recognise a person as having the nationality of another Member State under certain conditions only, the consequence would be that the class of persons to whom Union rules applied could vary from one Member State to another (as was explicitly remarked by the ECJ in *Micheletti*[94]). Situations could arise in which some Member States would recognise a person as having the nationality of another Member State, whereas other Member States would refuse to recognise this. The person in question would have the right to exercise his or her Union rights in the first category of Member States, but not in the second one. Such a situation would run counter to the Union objective of free movement of persons, as the free movement of persons in a Member State whose nationality they do not possess would vary

---

88 See: Brownlie *Principles of Public International Law* (7th ed.) (Oxford, Oxford University Press, 2008), 400 *et seq*.; Zimmermann, "Europäisches Gemeinschaftsrecht und Staatsangehörigkeit der Mitgliedstaaten unter besonderer Berücksichtigung der Probleme mehrfacher Staatsangehörigkeit" (1995) *EuR*., 45-70; Kovar and Simon, "La citoyenneté européenne" (1993) *C.D.E.*, at 291-292.

89 Noteworthy in this regard is that AG Tesauro in *Micheletti* explicitly remarked that: "I do not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a 'romantic period' of international relations and, in particular, in the concept of diplomatic protection; still less, in my view, is the well known (and, it is worth remembering, controversial) Nottebohm judgment of the International Court of Justice (8) of any relevance" (Opinion of AG Tesauro in Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 5).

90 See Article 3 of the Hague Convention, stating: "Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses".

91 See n. 5, *supra*. Article 3 of the Convention states: "Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

92 ECJ, Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, para. 28. Similarly, AG Jacobs in his Opinion to the case remarked that "Whilst the 1930 Hague Convention entitles the Belgian authorities to treat the children as Belgian nationals within Belgium, it does not require those authorities to ignore their other nationality" (see Opinion of AG Jacobs in Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, para. 52).

93 Admittedly, such is not always the case. It will depend on the national measure which is disputed. I refer to the judgment in *McCarthy* (ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr.) And the detailed discussion thereof in Chapter 4, *infra*.

94 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 12.

from one Member State to another. More broadly, it would run counter to the objective of an internal market,[95] which implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States.[96]

The *Micheletti* judgment predates the introduction of Union citizenship, but its *rationale* has become even more compelling since. Not surprisingly, the judgment has been referred to in a number of cases on Union citizenship.[97] Indeed, given that Union citizenship has to be viewed as the fundamental status of nationals of the Member States,[98] entailing certain uniform rights and duties throughout the Union, it has become even more important that the scope of "nationals of a Member State" is determined uniformly and unambiguously throughout the EU. Hence, the duty on the part of the Member States to unconditionally recognise nationality conferrals by other Member States has become inevitable in a way. The absence of this duty would not only run counter to the objective of an internal market, by impeding the exercise of economically active persons of their rights in all the Member States. It would, since the introduction of Union citizenship, equally prevent economically non active persons from exercising their rights in a uniform way throughout the Union. Such would be irreconcilable with the objective of the Union to create an "ever closer union among the peoples of Europe"[99] and to create a "Citizens' Europe".[100]

The only other conceivable option to preserve the *effet utile* of the provisions on Union citizenship would be the enactment of uniform rules at Union level to determine its scope *ratione personae*. But, as explained above, Member States do not seem prepared at present[101] to accept such rules for fear of losing one of their key competences. They have always wanted to preserve their sovereign competence concerning nationality. However, there is an obvious flipside to the sovereign competence of a given Member State to determine nationality. That flipside is that all other Member States too have the competence to determine who is to have their nationality and who is not. A Member Sate cannot, within the framework of the EU, claim the competence to determine nationality in a completely sovereign way, but at the same time deny other Member States this competence. Such would run counter to some of the most fundamental principles of Union law, such as the principle of sincere cooperation (Article 4(3) TEU). As such, the ECJ, in imposing the duty of unconditional recognition, does actually no more than taking this situation to its logical consequences. That seems to be an additional strong argument for approving the *Micheletti* judgment.

---

95 See Article 26(2) TFEU, stating that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

96 See ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 68.

97 In particular: ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 39 and 45 (see the discussion below). See also ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 39; ECJ, Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, para. 28; ECJ, Case C-192/99 *Kaur* [2001] E.C.R. I-1237, para. 19. Besides, the judgment has been referred to by a number of Advocatea General in cases on Union citizenship; see *e.g.* Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 20 and 32; Opinion of AG Tizzano in Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 38; Opinion of AG Ruiz-Jarabo Colomer in Case C-138/02 *Collins* [2004] E.C.R. I-2703, para. 23; Opinion of AG Jacobs in Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, para. 52.

98 See n. 39, *supra*.

99 See the preambles to the TEU and TFEU and Article 1, second para., TEU.

100 *See,* by analogy, Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe" (2008) 35 *LIEI*, 50-51.

101 For possible future developments, see under VI., *infra*.

The *Micheletti* principle of unconditional recognition potentially has significant consequences with regard to the Member States' competence regarding nationality. Admittedly, it confirms – as a matter of principle at least[102] – the competence of the Member States in the field of nationality. However, the ECJ couples this *a priori* competence with the duty to unconditionally respect the like competence of the other Member States. On closer examination, this duty appears to set in action a subtle mechanism of interplay between the Member States. The reason is that a decision taken by one Member State to grant its nationality to a certain group of persons can have important consequences for other Member States, as they have to unconditionally recognise the persons in question as Union citizens entitled to claim certain rights throughout the Union, including the territory of their own Member State. As Meehan has put it: the establishment of Union citizenship entails "stronger commonality and reciprocity of rights in different Member States".[103] More specifically, it would seem to be the case that Member States with flexible nationality legislation in place will potentially attract a greater number of non-EU immigrants intending to acquire the nationality for themselves or for their children.[104] This nationality will permit them in turn, as Union citizens or family members of a Union citizen to claim, under certain conditions, a number of important rights and benefits in other Member States such as social security benefits for instance.[105] Eventually this phenomenon may result in political pressure by some Member States on other Member States to change their nationality laws, in order to make them more restrictive. As such, Union citizenship may, through this subtle mechanism, indirectly influence Member State policies in the field of nationality. In the following I will analyse this possibility by considering in some detail fairly recent changes in the nationality laws of two Member States: Ireland, on the one hand, and Spain, on the other hand.

2. Ireland

a) Traditional Irish nationality law and the Zhu and Chen case

Traditionally, Ireland's nationality legislation was centred on the *ius soli* principle (also known as "birthright citizenship").[106] This meant that every person born on the Irish territory

---

102 The Court slightly qualified its dictum by adding that this competence had to be exercised having due regard to Union law. See the discussion under V., *infra*.

103 Meehan, "Europeanization and Citizenship of the European Union", in (2000) *Yearbook of European Studies*, 169-172 (cited by Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2007) *Tul. Eur. & Civ. L.F.*, 124).

104 See the discussion of the *Zhu and Chen* case under IV.A.2., *infra*. Another case in point is *Ruiz Zambrano* (see the detailed discussion in Chapter 4, *infra*).

105 See *e.g.* ECJ, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193.

106 For an overview of the history of Irish nationality legislation, see Handoll, "Ireland", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses* (Amsterdam, Amsterdam University Press, 2006), 292-305; Ryan, "The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland" (2004) 6 *Eur. J. Migration & L.*, 124-125, 173-193. In the EU, Ireland was the only Member State applying an unconditional *ius soli* principle in its nationality legislation. Other Member States, like Germany since the year 2000, apply the principle, but surrounded by other conditions related to the residence of the parents (for a discussion, see Hailbronner, "Germany", in R. Bauböck, E. Ersbøll, K. Groenendijk and H. Waldrauch (eds.), *Acquisition and loss of nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses*, (Amsterdam, Amsterdam University Press, 2006), pp. 213-251). For an overview of recent developments in European Countries with regard *ius soli* citizenship, see Honohan, "Ius Soli Citizenship" (2010) *EUDO CITIZENSHIP Policy Brief No. 1, available at* http://eudo-citizenship.eu/policy-briefs, *available at* http://eudo-citizenship.eu/policy-briefs (the author concludes that

automatically became an Irish citizen.[107] In 1956 the *ius soli* principle was extended to those born in Northern Ireland[108] and, as a result of the 1998 referendum on Northern Ireland, the birthright citizenship for all persons born on the island of Ireland became a constitutional right.[109] Since 2005 however, Irish nationality legislation has become more restrictive and the unconditional *ius soli principle* no longer applies.[110] Below I will discuss these recent changes to the Irish nationality law in detail. I will argue that they were to a large extent prompted by influences deriving from Union law. Before doing so it is necessary, however, to discuss the *Zhu and Chen*[111] case of 2004 in some detail, as it will be very important for my argumentation.

The *Zhu and Chen* case concerns Chinese parents who wanted to have more than one child, but were not so entitled under Chinese law.[112] After careful consideration, they decided to have their second baby, Catherine Zhu, born in Belfast. Belfast was chosen because, as was just explained, Irish nationality law at the time of the facts entitled anyone born on the island

---

there is a trend towards the wider availability of *ius soli* citizenship, but in more conditional forms, dependent on limited forms of prior parental residence and other conditions identified with integration). Outside Europe, the *ius soli* principle is adhered to by a number of countries, most importantly perhaps by the US (for a discussion of US birthright citizenship and its historical origins, see Ngai, "Birthright Citizenship and the Alien Citizen" (2006) 75 *Fordham L. Rev.*, 2521-2530). For further discussion, see also M Bös, 'The Legal Construction of Membership: Nationality Law in Germany and the United States', in *Germany and Europe Working Papers Series 00.5,* The Minda de Gunzburg Center for European Studies at Harvard University, http://www.ces.fas.harvard.edu/publications/docs/pdfs/Boes.pdf.

107 See already the Irish Nationality and Citizenship Act 1935, providing that all those born in the Irish Free State (*Saorstát Éireann*) on or after 6 December 1922 were classed as "natural-born citizens" (s 2(1)(a) and (b) of the Act).

108 Irish Nationality and Citizenship Act 1956, s 6(1).

109 In the referendum an overwhelming majority approved an amendment to Article 2 of the Irish Constitution, which took effect on 2 December 1999. The amended Article 2 read: "It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage." Being part of the Irish nation was to be understood as being an Irish citizen (see *A.O. and D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, 131).

110 It appears that the Irish restriction of birthright citizenship is not a lone-standing case. In the last decades, other countries formerly applying an unconditional *ius soli* principle have modified or abolished their legislation on this point. A recent example is New Zealand: see the Citizenship Amendment Act 2005, 2005 S.N.Z. No. 43 (N.Z.) (limiting territorial birthright citizenship to children with at least one New Zealand citizen or permanent-resident parent). See also the discussion in Grossman, "Birthright Citizenship as Nationality of Convenience" (2004) *Proceedings, Council of Europe, Third Conference on Nationality, Strasbourg, 11-12 Oct. 2004*,114-117. The abolishment of birthright citizenship is also the subject of recent debates in the US. Proposals to abolish US birthright citizenship in 2005, 2007 and 2009 did not gain approval in Congress. For a comment, see Schumacher-Matos, Denying citizenship for illegal immigrants' children is a bad idea, (2010) *Wahington Post*, 27 June 2010. See also Lacey, "Birthright Citizenship Looms as Next Immigration Battle" (2011) *New York Times*, 4 January 2011.

111 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, with case notes by King in (2007) 29 *Loy. L.A. Int'l & Comp. L. Rev.*, 291-307; Kunoy in (2006) 43 *CML Rev.*, 179-190; Carlier in (2005) 42 *CML Rev.*, 1121-1131; Tryfonidou in (2005) *E.P.L.*, 527-541; Vanvoorden in (2005) 4 *Colum. J. Eur. L.*, 305-32.

112 Under Chinese law, each family was entitled to have only one child unless they satisfied certain special criteria for a second child. See the Population and Family Planning Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), Article 18, *available at* http://english.gov.cn/laws/2005-10/11/content_75954.htm (P.R.C.). See also Skalla, "China's One-Child Policy: Illegal Children and the Family Planning Law" (2004) 30 *Brook. J. Int'l L.*, 334. Women who became pregnant a second time faced the imposition of fines, the disqualification of benefits, the deprivation of farmland, the destruction of homes, and/or "psychological mauling, sleep deprivation, arrest and grueling mistreatment" (*Ibid.*, 338-40).

of Ireland (including Northern-Ireland) to claim Irish nationality[113] and thereby become a Union citizen (see Article 20(1) TEC). Catherine's parents intended to use the child's Union citizenship to ensure that both the child and her mother would be granted a right to reside in the United Kingdom under Directive 90/364, which conferred this right on Union citizens and their family members.[114] The UK authorities, however, refused to issue a long-term residence permit, arguing *inter alia* that a party cannot rely on EU provisions where purposefully exploiting Union law.[115] According to the UK authorities, Mrs. Chen's[116] move to Northern Ireland was solely motivated by the desire to have her baby acquire Irish nationality, in order for the family to then be able to claim a right of residence in the UK. The crux of the argument was that Mrs. Chen tried to circumvent UK regulations on residence permits by taking advantage of Ireland's more expansive citizenship rules. This argument was based in essence on earlier case law in which the ECJ had held that Member States were entitled to take measures designed to prevent nationals from attempting, under cover of the rights created by the Treaties, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Union law[117] (sometimes referred to as the "U-turn doctrine").

In the *Zhu and Chen* case, the ECJ had no difficulty at all in rejecting the argument.[118] It pointed at the simple fact that baby Catherine had validly obtained the Irish nationality, in accordance with the rules laid down in the Irish nationality act.[119] As a consequence, she had to be recognised by the UK as an Irish national. The fact that Mrs. Chen's residence in Belfast was fully aimed at producing the right circumstances to obtain a right of residence in the UK was not relevant in this regard. Indeed, it followed from *Micheletti* that the UK had to unconditionally accept the grant of Irish nationality and could not attach a further condition to this recognition, such as a condition that that nationality should not have been acquired in order to obtain a right of residence for a third country national in another Member State.[120] Besides, the ECJ decided that, in order to satisfy the condition of possessing sufficient resources, as prescribed by Directive 90/364, the origin of those resources did not matter and that they could for instance be provided by the mother of a dependent Union citizen.[121] Furthermore it was of the opinion that, despite the wording of the Directive 90/364, not only *dependent* ascendants were entitled to join a Union citizen in the host Member State, but that

---

113 S 6(1) of the Irish Nationality and Citizenship Act of 1956, as amended by the Irish Nationality and Citizenship Act 1986, the Irish Nationality and Citizenship Act 1994 and the Irish Nationality and Citizenship Act 2001.

114 See Article 1 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence, [1990] O.J. L180/26 , now replaced by Directive 2004/38 (n. 194, *infra*).

115 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 34.

116 Catherine's mother was born Man Lavette Man Chen, but upon her marriage to Guoqing Zhu (known as Hopkins Zhu) she in fact became Mrs. Zhu, and this is the name she bore when the case was lodged. The reference to "Chen" in the name of the case therefore probably ensues from a misunderstanding (see the clarifications made by Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 47, footnote 22). I will however, refer to the mother as Mrs. Chen, since this is the name by which the case has become famous.

117 See *e.g.* ECJ, Case 33/74 *Van Binsbergen* [1974] E.C.R. 1299, para. 13; ECJ, Case 115/78 *Knoors* [1979] E.C.R. 399, para. 25; ECJ, Case 229/83 *Leclerc and Others* [1985] E.C.R. 1, para. 27; ECJ, Case 39/86 *Lair* [1988] E.C.R. 3161, para. 43; ECJ, Case C-61/89 *Bouchoucha* [1990] E.C.R. I-3551, para. 14 and, for more recent examples, ECJ, Case C-212/97 *Centros* [1999] E.C.R. I-1459, para. 24; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] E.C.R. I-7995, para. 35.

118 This was hardly a surprise: to date, the argument has virtually never been accepted by the ECJ in the circumstances of a specific case.

119 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 39.

120 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 40.

121 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 28-33.

the same was true for the parent of a minor who is that minor's primary carer.[122] The end result was that Catherine and her mother, who fulfilled the conditions of the directive as they were interpreted by the ECJ, had a right to reside for an indefinite period in the UK.[123]

The *Zhu and Chen* case confirms, in very clear terms, that Member States cannot in any way refuse to recognise a person's nationality where it was validly obtained under the nationality legislation of another Member State, even where this nationality was acquired precisely to be able to exploit the rights attached to the status of Union citizenship. It is perfectly permissible under Union law for a third country national to acquire the nationality of the Member State with the most flexible nationality law with the sole purpose of thereby acquiring, under certain conditions, a right of residence in another Member State, for example the Member State with the most generous social security payments. Such behaviour does not in any way constitute an abuse of law. Quite to the contrary, it is using the citizenship provisions to attain one the objectives they seek to attain, namely the free movement of Union citizens. As AG Tizzano observed in *Zhu and Chen*:

> "This is not a case of people '*improperly or fraudulently* invoking [Union] law', failing to observe the scope and purposes of the provisions of that legal system, but rather one of people who, apprised of the nature of the freedoms provided for by [Union] law, take advantage of them by legitimate means, specifically in order to attain the objective which the [Union] provision seeks to uphold: the child's right of residence."[124]

At the same time, *Zhu and Chen* neatly illustrates the significant effects the more flexible nationality legislation of one Member State may have on other Member States. The flexible Irish nationality legislation made it rather easy for third country nationals to obtain a right of residence in the Member States. It was sufficient for third country nationals to come to Ireland under a temporary residence permit such as a tourist visa and have their children born there, in order to derive a right of residence in the other Member States, as long as the conditions of the Directive 90/364 were met.[125] This right of residence entitled these third country nationals, moreover, to claim in the host Member State, the UK in the *Zhu and Chen* case, equal access to a number of important rights and benefits, such as social security benefits.[126] This shows how Union law mandates the Member States to accept as beneficiaries of certain rights and benefits individuals they could, in the absence of flexible nationality legislation in place in another Member State, have excluded therefrom. It is clear that this imposed enlargement of the circle of beneficiaries can have significant financial consequences for the host Member State. This might lead to a concern in certain Member States that the influx of Union citizens and their family members might upset the financial balance and distort the socio-economic conditions in that Member State. Naturally this will lead to political forces to counter this phenomenon: the Member State with flexible nationality

---

122 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 42-46. On this issue, see in great detail Chapter 5, *infra*.

123 ECJ, Case C-200/02 Zhu and Chen [2004] E.C.R. I-9925, para. 47.

124 Opinion of AG Tizzano in Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 122 (italics as they appear in the text of the opinion).

125 King (King, "Chen v. Secretary of State: Expanding the Residency Rights of Non-nationals in the European Community" (2007) 29 *Loy. L.A. Int'l & Comp. L. Rev.*, 291) remarks in this regard that the USA face a similar form of "birth tourism" because of the *ius soli* principle enshrined in the 14th amendment to the US Constitution. Although the drafters of the 14th Amendment only envisioned extending citizenship to the newly freed slaves, the US Supreme Court later interpreted the amendment as granting citizenship to all children born to immigrants (*United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898)).

126 See *e.g.* ECJ, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193.

legislation may well face a lot of political pressure from other Member States to make its nationality legislation more stringent.[127]

Moreover, it must be remarked that consequences will flow from the provisions on Union citizenship even for the Member State which conferred its nationality. The reason is that, as was explained higher with regard to the *Zhu and Chen* case, every Union citizen has the right, under certain circumstances, to be joined by his non-EU family members. This holds true in the first place with regard to other Member States, of which the Union citizen concerned does not have the nationality. Indeed, in his or her own Member State the Union citizen will often not be able to rely on the right to family reunification because he or she will find himself or herself in a "purely internal situation".[128] However, such will no longer be the case once he has exercised his rights of free movement by moving to another Member State. The ECJ has firmly held for instance that if a Union citizen was joined by his spouse in the host Member State he must have the same rights upon return to his own Member State because he might be deterred from leaving his country of origin if, on returning to the Member State of which he is a national "the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the [Treaties] or secondary law in the territory of another Member State".[129] As a consequence of this, Ireland would in certain circumstances be obliged under Union law to grant a right of residence to third country family members of Irish nationals whom would not have enjoyed this right under domestic Irish law.[130]

The bottom-line is that, through the provisions on Union citizenship, the more flexible nationality laws of one Member State can have serious consequences for the budget and the system of immigration control of all Member States. These consequences might very well explain the recent changes in Irish nationality legislation. Indeed, in essence, problems like the one faced by the UK in the case of *Zhu and Chen* did not stem from the Union provisions on Union citizenship as such, but rather from Irish nationality law.[131] As AG Tizzano remarked[132]:

> "The fact is that the problem, if problem there be, lies in the criterion used by the Irish legislation for granting nationality, the *ius soli*, which lends itself to the emergence of situations like the one at issue in this case. In order to avoid such situations, the criterion could have been moderated by the addition of a condition of settled residence of the parent within the territory of the island of Ireland. But there is no such additional condition in Irish legislation, or in any event no such condition was applicable to Catherine".

---

127 See the discussion and references in Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2006) 10 *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop, 11 *et seq.* See also the more elaborate version of this contribution published as Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2007) *Tul. Eur. & Civ. L.F.*, 89-156.

128 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 76-78. If certain conditions are fulfilled, a Union citizen can even claim the right to be joined or accompanied by a family member in his own Member State in what is traditionally considered to be a purely internal situation (see ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr and the detailed discussion in Chapter 4, infra, under III.).

129 ECJ, Case C-370/90 *Singh* [1992] E.C.R. I-4265, paras 19-20 in particular.

130 It unambiguously follows from the case law of the Irish Supreme Court that family members of an Irish citizen do not have an automatic right under Irish law to reside in Ireland; see *e.g. A.O. and D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, 131. See on this case law, in some detail, Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who belongs'?" (2005) 25 *Legal Stud.*, 582-585; Ryan, "The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland" (2004) 6 *Eur. J. Migration & L.*, 180-185.

131 See Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 114.

132 Opinion of AG Tizzano in Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 124-125.

In the following I will first set out the 2004 change of Irish nationality legislation in some detail, before setting out to determine to what extent it might have been prompted by considerations linked to the provisions on Union citizenship.

b) 2004 change in Irish nationality legislation and its explanation

In March 2004, the Irish Government officially announced a proposal to restrict the constitutional provision for birthright citizenship in the case of children of non-nationals.[133] The constitutional amendment was approved on 11 June 2004 through a referendum, by an overwhelming majority (79% to 21% on a 60% turnout).[134] The amendment did not modify Article 2 of the Constitution (quoted above), but inserted a new Article 9(2) reading[135]:

> "1° Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.
> 2° This section shall not apply to persons born before the date of the enactment of this section."

The amendment returned to the Irish Parliament the power to determine the conditions for acquiring Irish citizenship. Approval of the constitutional amendment was followed by the adoption of the Irish Nationality and Citizenship Act 2004, which once again modified the Irish Nationality and Citizenship Act 1956, and entered into force on 1 January 2005.[136] The new act confirmed that children born in Ireland on or after 1 January 2005 would no longer acquire the Irish nationality automatically.[137] In order to obtain Irish citizenship, an additional element is now required to birth in the island of Ireland, like the fact that a parent has lawfully resided for a certain period in Ireland (or was entitled thereto) prior to birth or elements of *ius sanguinis*, such as being born to a parent with (an entitlement to) Irish citizenship or with British citizenship. The Act maintains an exception however for persons born in the island of Ireland who are not entitled to citizenship of any other country.[138]

It is clear from these changes that, at present, Irish nationality laws are no longer based on unconditional *ius soli*.[139] The changes are radical, given the longstanding republican tradition of birthright citizenship and also remarkable in the light of the Belfast Agreement and the consequent 1998 referendum, where the Irish people, by a vast majority, voted for the

---

133 The proposed amendment, and a draft of the legislation to follow it, were published in April; see Department of Justice, Equality and Law Reform, Citizenship Referendum: The Government's Proposals (April 2004).

134 Ryan, "The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland" (2004) 6 *Eur. J. Migration & L.*, 189.

135 See the Twenty-seventh Amendment of the Constitution Act, 2004 of 24 June 2004 [Irish citizenship of children of non-national parents].

136 The Act entered into force on 1 January 2005: Irish Nationality and Citizenship Act 2004 (Commencement) Order 2004.

137 See s 4 of the Irish Nationality and Citizenship Act 2004, adding a s 6A and a s 6B to the 1956 Act.

138 See s 6(3) of the Irish Nationality and Citizenship Act, which provides "A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country". This is consistent with Ireland's human rights obligations (Hofstotter, "A Cascade of Rights, or Who Shall Care For Little Catherine? Some Reflections on the Chen Case" (2005) 30 *E.L. Rev.*, 557).

139 A same similar move to abandon traditionally *ius soli* based nationality laws had already taken place in the UK and Australia; see Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who belongs'?" (2005) 25 *Legal Stud.* 593-594.

inclusion of unconditional *ius soli* into the Irish Constitution.[140] Such changes must have been prompted by strong motives. It is now time to inquire to what extent they might have been prompted by considerations related to Union law, as was suggested higher.

I will start my analysis by pointing out that it is not immediately self-evident that considerations deriving from Union law have indeed played a preponderant role in the recent reforms of Irish nationality law. One could *prima facie* well explain the changes as being prompted by purely domestic issues. As is well-known, Ireland experienced in the 1990s a period of rapid economic growth, for which it became known as the "Celtic tiger".[141] This rapid growth attracted a large number of third country immigrants in search for work. It appears that many of them used the flexible Irish nationality laws to obtain Irish citizenship for their children, and then claimed a right of residence in Ireland as family members of an Irish citizen.[142] This was demonstrated by the fact that a large number of immigrants came to Ireland heavily pregnant expressly to give birth in order to obtain Irish citizenship for their babies.[143] This phenomenon of "citizenship tourism" stirred up a lot of controversy and many Irish citizens felt the flexible Irish rules were abused and that there was too large an intake of immigrants.[144] This concern was given voice in the build-up to the referendum by the then Irish Prime Minister Bertie Ahern, who officially stated that the birthright citizenship was being "rampantly abused", with 60% of all asylum seekers being pregnant when they made their applications.[145] Closing this "loophole", and hence preventing the abuse of birthright citizenship, was one of the main reasons advanced for the proposed amendments to the Irish constitution.[146] The Irish government added that because of the said abuse, Dublin's maternity hospitals had become overburdened, which was, according to the government, an additional strong argument for change.[147]

---

140 See n. 109, *supra*. In order to avoid the impression that the proposed 2004 amendments to the Constitution would come down to a unilateral change of the Belfast Agreement, the Irish and British governments even issued an interpretative declaration, stating that "it was not their intention in making the said Agreement that it should impose on either Government any obligation to confer nationality or citizenship on persons born on the island of Ireland whose parents do not have sufficient connection with the island of Ireland".

141 See *e.g.* Murphy, *The "Celtic Tiger"*, European University Institute working paper, 2000, 35 pp; MacSharry and White, *The Making of the Celtic Tiger: The Inside Story of Ireland's Boom Economy* (Dublin: Mercier Press, 2000), 280 pp.

142 In application of the Supreme Court in Fajujonu (*Fajujonu v Minister for Justice* [1990] 2 IR 151; [1990] ILRM 234), family members of Irish citizens were in most cases allowed to stay in Ireland. This case law was reversed however in 2003, with *A.O. and D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1 (cf. n. 130, *supra*). See on the evolution in the case law: Ryan, "The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland" (2004) 6 *Eur. J. Migration & L.*, 180-185; Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who belongs'?" (2005) 25 *Legal Stud.*, 582-585.

143 Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2006) 10 *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop, 17-18.

144 Rostek and Davies quote figures which clearly demonstrate the spectacular increase in immigration. For instance, the number of babies born to non-nationals skyrocketed from 2% in 1999 to almost 20% in 2004 (Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2006) 10 *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop, 17-18).

145 Quoted by (148) Helm, "Ireland struggles with immigration issue", (4/4/2004) *available at* http://news.bbc.co.uk/2/hi/europe/3595547.stm.

146 Harrington, "Citizenship and the Biopolitics of Post-nationalist Ireland" (2005) 32 *Journal of Law and Society*, 444.

147 The Irish Minister for Justice, Michael McDowell, soon after the referendum was announced, declared: "Our maternity services come under pressure because they have to deal at short notice with women who may have communications difficulties, about whom no previous history of the pregnancy or of the mother's health is known, and who in about half of cases of first arrival ... are already at or near labour.

As such, the need to make Irish nationality laws more restrictive could have been explained by skyrocketing immigration, especially since a similar move to make nationality laws more restrictive has been noticed in the past in other countries which experienced an economic boom.[148] Yet there are important indications that the foregoing cannot wholly explain the 2004 amendments to the Irish constitution. First of all, it must be remarked that the case for a restriction of nationality laws in order to reduce the potential for citizenship tourism had been greatly diminished by the above mentioned change in the case law of the Irish Supreme Court, holding that third country family members of an Irish citizen no longer had an automatic right of residence in Ireland.[149] As a consequence of this case law, the possibility for citizenship tourism was greatly reduced, as many non-EU parents were not granted a right to reside in Ireland. Of course third country nationals could still, under certain conditions, derive a right of residence in the other Member States, and even in Ireland itself, from Union law, even in the absence of such right under domestic Irish law. This probably explains why the Supreme Court's judgment did not eventually lead to the predicted decrease in inward migration in Ireland.[150]

The possibility for third country nationals travelling to Ireland to give birth in order to derive a right of residence in another Member State was highlighted, of course, by the *Zhu and Chen* case, which seems to have had a strong impact on the Irish decision-makers. Admittedly, the result of the 2004 referendum can not have been influenced by the outcome of *Zhu and Chen*. In fact the referendum, which took place on 11 June 2004, predated the judgment in *Zhu and Chen*, which was pronounced on 19 October 2004. Still the case seems to have had a considerable impact on the proposals of the Irish government and on the result of the referendum. It must be pointed out in this connection that the Opinion of AG Tizzano,[151] which was later substantially taken over by the Court, was delivered on 18 May 2004, *i.e.* during the Irish referendum campaign, and was heavily debated in the press.[152] Moreover, the Irish Minister of Justice publicly stated that the *Zhu and Chen* case had acted as "an impetus" in the preparations of the citizenship referendum, and the government claimed, in reaction to the AG's opinion that, the case had vindicated the decision to hold the referendum.[153]

It clearly results from the foregoing that considerations connected to Union citizenship, highlighted by the *Zhu and Chen* case, were arguably a dominant factor explaining the recent changes in Irish nationality legislation. The flexible Irish nationality rules seem to have been systematically used by third country nationals to obtain residence rights in other Member States as (family members of) Union citizens. The resulting increase in immigration must

---

Hospitals cannot predict the demand on resources from month to month, and all the resources in the world would be of little use in dealing with suddenly-presenting crisis pregnancies (quoted by Ryan, "The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland" (2004) 6 *Eur. J. Migration & L.*, 188). The argument is discussed in some detail in Harrington, "Citizenship and the Biopolitics of Post-nationalist Ireland" (2005) 32 *Journal of Law and Society*, 444-446.

148 A well-documented example is the US. See also *supra*, n. 106 and 125.

149 *A.O. and D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1.

150 See "the argument for", presented by Noel Whelan, *available at* http://www.irishtimes.com/focus/referendum2004/for_2.html; Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who belongs'?" (2005) 25 *Legal Stud.*, 585.

151 Opinion of AG Tizzano in Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925.

152 Harrington, "Citizenship and the Biopolitics of Post-nationalist Ireland" (2005) 32 *Journal of Law and Society*, 446-447, citing Coulter, "European Court Decision Casts doubt on Policy of Deportation", *Irish Times*, 20 May 2004.

153 "McDowell insists his action heads off 'threat'" (Mark Hennessy, Wed. 19 May 2004), *available at* http://www.irishtimes.com/focus/referendum2004/pathtopoll/1084325396929.html.

have been a cause of concern for the other Member States, especially for those with strict nationality and migration laws, because the impact of their efforts to protect their borders was reduced by the fact that immigrants could make use of the flexible Irish legislation to gain access to their territory.[154] Whilst there never was a formal request from the Commission or from one of the Member States to change the Irish legislation,[155] it seems very plausible that was some informal pressur on Ireland to change its laws and align its policies with current EU trends.[156] Telling in this regard are the declarations of the Irish Minister for Justice, in reaction to the Opinion of the AG in *Zhu and Chen*, that a failure to adopt the proposed changes to the Irish constitution could cause "massive difficulties for our relations with other states in the EU".[157] Furthermore, there was a recurring insistence by pro-amendment commentators on the fact that the Irish laws stood out from the laws in all other Member States and that the problems incurred could be solved by bringing them more in line with the laws of the other Member States.[158] One can conclude that the Irish case convincingly illustrates the indirect influence Union law may have on the nationality legislation of the Member States. The bottom-line is that the Irish decision-makers responded to impulses connected with Union citizenship by making their nationality laws more restrictive and thus bringing them more in line with the nationality laws of other Member States.[159]

---

154 Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2006) 10 *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop, 19.

155 Some opponents of the suggested amendment expressly denied the need to change their citizenship legislation due to the EU membership, pointing out that there had never been a formal request from Europe, or any pressure to alter their nationality law. See *e.g.* the Irish Council for Civil Liberties, 'Briefing on proposal for a referendum on citizenship' May 2004, *available at* http://iccl.ie/DB_Data/publications/04_draft_referendumpaper.pdf and its "No Vote Campaign Flyer", *available at* http://iccl.ie/DB_Data/publications/vote_no_extra.pdf.

156 Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2006) 10 *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop, 20, who point out that a Member State aware of its political interdependence on neighbouring states, and not wishing to alienate them and incur possible future 'revenge' costs, may choose to voluntarily align their policies with current EU trends and that the Irish case is probably a good example of this. Harrington observes in this regard that "the Irish elite was anxious to remedy the state's porosity and to overcome metropolitan perceptions of its questionable Europeanness" (Harrington, "Citizenship and the Biopolitics of Post-nationalist Ireland" (2005) 32 *Journal of Law and Society*, 447). Handoll, for his part, remarks in this regard: "It was, to say the least, potentially embarrassing to the Irish Government to retain a citizenship regime, with such [Union] law consequences in another Member State, especially where [a similar right of residence for non-EU parents] had been rejected in Irish law" (Handoll, "Ireland", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses* (Amsterdam, Amsterdam University Press, 2006), 306).

157 "McDowell insists his action heads off 'threat'" (Mark Hennessy, Wed. 19 May 2004), *available at* http://www.irishtimes.com/focus/referendum2004/pathtopoll/1084325396929.html.

158 See "the argument for", presented by Michael McDowell, former Minister for Justice, *available at* http://www.irishtimes.com/focus/referendum2004/for_1.html.

159 Another example of a change in Member State nationality legislation under influence of Eu law is the restriction of Belgian nationality legislation in 2006. The previously existing flexible Belgian nationality legislation allowed children born in Belgium to adopt the Belgian nationality and this, in turn, gave rise to entitlement to residence to their third country parents. This flexible nationality legislation was the basis for the dispute in the famous *Ruiz Zambrano* case (see the detailed discussion in Chapter 4, *infra*). Admittedly, the change in the Belgian nationality legislation occurred long before the judgment in the *Ruiz Zambrano* case. Still, the 2006 restriction of the conditions for acquisition of the Belgian nationality can arguably be explained by the occurrence of many cases with facts similar to those of *Ruiz Zambrano*. See the discussion in Foblets and Loones, "Het Wetboek van de Belgische nationaliteit andermaal herzien (2006): het parlement ontzien of gezien?" (2007) *T.Vreemd.*, 23-39. See also Maes, "Vreemdelingen zonder legaal verblijf met Belgische kinderen: uitzetting van onderdanen of beschermd gezinsleven als hefboom voor regelmatig verblijf" (2005) *T. Vreemd.*, 332-339. For a more detailed discussion, I refer to Chapter 4, *infra.*

As a final remark, it must be pointed out that Irish nationality laws are still more lenient than those of most other Member States. In particular, it is very easy for descendants of Irish emigrants, who were born abroad, to obtain an Irish passport and thereby Union citizenship. Under the Irish Nationality and Citizenship Act, a person born outside the island of Ireland is an Irish citizen even if the parent through whom he or she derives citizenship was also born outside the island of Ireland, on condition that that person's birth is registered[160] or that the parent through whom that person derives citizenship was at the time of that person's birth abroad in the public service.[161] Third generation Irish descendants from various places all over the world have claimed their Irish citizenship, which enabled them to travel and work in the whole EU, even though they did not have any personal connection with Ireland.[162] One could wonder whether this too will need to be changed in the future as a consequence of the interplay described above. Other Member States may find the easy access for third country nationals living abroad to Irish, and hence European, citizenship worrisome for the same reasons as set out above.[163] In reaction to these concerns they might very well put political pressure on Ireland to make the possibility of acquiring the Irish nationality through *ius sanguinis* more restrictive.

Yet, it is unlikely that this mechanism will lead to a restriction of Irish citizenship by descent just like it did with regard to Irish birthright citizenship. It must be noted, in the first place, that the connection between Ireland and its citizens and their descendants living abroad is very important, especially in the light of the past waves of emigration.[164] It will probably not be changed, therefore, except for the most convincing of reasons. Moreover, other Member States will probably not react in the same way as with regard to the former unconditional *ius soli* legislation. The reason is that most other Member States have nationality legislations based on *ius sanguinis,* and some of them are even more generous with regard to citizenship by descent.[165] It can be expected therefore that Irish nationality legislation as it is currently in place will not undergo further changes as a result of political pressure from other Member States in the near future.

---

160 See Article 27 of the Irish Nationality and Citizenship Act, "Registry of births abroad".

161 See Article 7 of the Irish Nationality and Citizenship Act, "Citizenship by descent".

162 Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2006) 10 *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop, 21.

163 It must be noted in this regard that the lenient possibilities for acquisition of Irish citizenship through descent were used as an argument against the 2004 proposals to amend the constitution. It was argued that if the governments primary concern was one of immigration control, it was acting inconsistently in restricting birthright citizenship while not changing the provisions on citizenship by descent, as entitlement to citizenship by descent was said to open up citizenship status to much greater numbers than did the application of the *ius soli* principle. See Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who belongs'?" (2005) 25 *Legal Stud.*, 587.

164 See *e.g.* the Address by former Irish President Mary Robinson to a Joint Sitting of the Houses of the Oireachtas (Irish Parliament) (2 February 1995), *available at* http://oireachtas.ie/viewdoc.asp?fn=/documents/addresses/2Feb1995.htm (on the importance of the Irish Diaspora). See also Article 2 of the Irish Constitution, stating that "the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage".

165 Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2006) 10 *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop, 21. See, for instance, on Italian nationality legislation, Arena, Nascimbene and Zincone, "Italy", in R. Bauböck, E. Ersbøll, K. Groenendijk and H. Waldrauch (eds.), *Acquisition and loss of nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses*, (Amsterdam, Amsterdam University Press, 2006), 329-366.

3. Spain

Another Member State with a tradition of very flexible nationality legislation is Spain.[166] In contrast to Ireland, where traditionally the system was based on an unconditional *ius soli*, Spain has a strong tradition of *ius sanguinis*, although elements of *ius soli* are now also present. Accordingly, the Spanish nationality is automatically acquired by descendants of a Spanish mother or father, regardless of the place of birth.[167] Besides, individuals whose father or mother originally had the Spanish nationality and was born in Spain have the option to acquire the Spanish nationality at their request[168] and the children or grandchildren of persons who originally had the Spanish nationality can acquire the Spanish nationality after only one year of residence in Spain.[169] This open attitude towards granting the Spanish nationality to individuals without substantial links to the Spanish territory has been explained by the fact that Spain has a long history of emigration, mostly to Latin-American countries.[170] A *ius sanguinis* based system of nationality has allowed Spain to maintain links with its emigrants and their descendants.

The strong historical and cultural ties with certain countries,[171] in particular the Latin-American countries also explain the special regime nationals of these countries enjoy under Spanish nationality law.[172] Nationals of Latin American countries, Andorra, the Philippines, Equatorial Guinea and Portugal and Sephardic Jews can obtain the Spanish nationality after two years of continuous legal residence in Spain, in contrast to the general requirement of ten years of residence.[173] Besides, a special regime concerning dual nationality is in place with regard to the said countries, which is even enshrined in the Spanish Constitution of 1978.[174] Nationals of Latin American countries, Andorra, the Philippines, Equatorial Guinea and Portugal do not have to renounce their original nationality when they acquire the Spanish nationality.[175] Conversely, Spanish nationals acquiring the nationality of one of those countries do not lose their Spanish nationality.[176]

---

166 For a concise overview of the nationality rules in force, see Álvarez Rodríguez, *Nacionalidad Española. Normativa Vigente e Interpretación Jurisprudencial* (Navarra, Aranzadi, 2008), 292 pp.

167 See Article 17.1.a) of the *Código Civil* ("los nacidos de padre o madre españoles").

168 See Article 20.1.b) of the *Código Civil* ("cuyo padre o madre hubiera sido originariamente español y nacido en España").

169 See Article 22.1.f) of the *Código Civil* ("El nacido fuera de España de padre o madre, abuelo o abuela, que originariamente hubieran sido españoles").

170 See the historical overview in Rubio Marìn and Sobrino, "Country Report: Spain" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/Spain.pdf, 4 *et seq.*; Rubio Marìn, "Spain", in R. Bauböck, E. Ersbøll, K. Groenendijk and H. Waldrauch (eds.), *Acquisition and loss of nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses*, (Amsterdam, Amsterdam University Press, 2006), 480 *et seq.*; Fuentes, "Migration and Spanish Nationality Law", in Hansen and Weil (eds) *Towards a European Nationality: Citizenship, Immigration and Nationality Law in the EU* (Basingstoke, Palgrave, 2001) 138-139.

171 Or the historical debt Spain may have towards certain groups of people, which explains notably the preferential treatment of Sephardic Jews (see Rubio Marìn and Sobrino, "Country Report: Spain" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/Spain.pdf, 23).

172 For a detailed discussion, see Rubio Marìn and Sobrino, "Country Report: Spain" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/Spain.pdf.

173 See Article 22 of the *Código Civil*.

174 See Article 11.3 of the Constitution ("El Estado podrá concertar tratados de doble nacionalidad con los países iberoamericanos o con aquellos que hayan tenido o tengan una particular vinculación con España. En estos mismos países, aun cuando no reconozcan a sus ciudadanos un derecho recíproco, podrán naturalizarse los españoles sin perder su nacionalidad de origen.").

175 Article 23.b) and 24.1 of the *Código Civil*.

176 Article 24.1, second subpara., of the *Código Civil*.

Historically, the issue of dual nationality was regulated first and foremost by Treaties on dual nationality ("Tratados de doble nacionalidad") concluded between Spain and most Latin-American countries.[177] These Treaties entitle nationals of these countries to keep their original nationality when they acquire the Spanish nationality and Spanish nationals to keep their Spanish nationality when they acquire the nationality of one of these countries. Originally, the Treaties provided that only the nationality of the country of domicile ("domicilio") would be the "active" nationality, while the other nationality would be "dormant" ("una nacionalidad durmiente/en estado de latencia").[178] This meant that Latin-American nationals with the Spanish nationality could only claim the benefits of this nationality, and thus the rights associated with Union citizenship,[179] as long as they resided in Spain. More recently, however, the Treaties have been amended by protocols which allow Latin American nationals with the Spanish nationality to obtain a Spanish passport – allowing them to claim Union citizenship – without having to transfer their domicile to Spain.[180] These Treaties have lost most of their significance after the introduction of the wide possibilities for dual nationality in the *Código Civil*, set out above.[181]

The bottom-line is that the flexible conditions for acquiring the Spanish nationality, combined with the tolerance for dual nationality make it very attractive for nationals abroad, in particular nationals from Latin-American countries, to acquire or preserve the Spanish nationality and, *ipso facto*, the status of Union citizen. Recent legal developments have only reinforced these attractive conditions, *inter alia* by widening the tolerant stance on dual nationality. The recent protocols to the Treaties on dual nationality, for instance, make it far more attractive to acquire the Spanish nationality to those Latin-American nationals who satisfy the requisite conditions,[182] because this nationality will henceforth give entitlement to a Spanish passport. De Groot has submitted in this connection that the recent protocol to the

---

177 Such Treaties have been concluded between 1979 and 1980, in chronological order, with Peru, Paraguay, Nicaragua, Bolivia, Ecuador, Costa Rica, Honduras, the Dominican Republic, Argentina and Colombia. The texts and full references of the Treaties are *available at* http://extranjeros.mtas.es/es/NormativaJurisprudencia/Internacional/ConveniosBilaterales/ConveniosDobleNacionalidad/. See the discussion in Vonk, "Latijns-Amerikaanse Spanjaarden en het Europees burgerschap" (2006) *Migrantenrecht*, 187-195; De Groot, "Latin-American European Citizens: Some Consequences of the Autonomy of the Member States of the European Union in Nationality Matters (editorial)" (2002) 9 *MJ*, 115-120; 128-129.

178 In case of residence in a third country, the nationality of the country of last residence was regarded as the "active" nationality. See Vonk, "Latijns-Amerikaanse Spanjaarden en het Europees burgerschap" (2006) *Migrantenrecht*, 189. See also the submissions of Spain in the *Micheletti* case, which concerned the application of identically worded provisions of the Treaty of dual nationality between Italy and Argentina and article 9.9. of the *Código Civil* (see n. 82, *supra*), which refers to the provision in the Treaties just described and contains a similar default regulation for cases where the Treaties are silent on this matter.

179 De Groot, "The Relationship between the Nationality of the Member States of the European Union and European Citizenship", in La Torre (ed.), *European Citizenship: An Institutional Challenge* (The Hague, Kluwer Law International, 1998), 128-129 (referring to Perez Vera, "El sistema español de doble nacionalidad ante la futura adhesión de España a las Comunidades Europeas" (1981) *Revista de institutions* europeas, 685-703).

180 Protocols to the various Treaties on dual nationality, employing different legal techniques, were signed between 1997 and 2001. See the discussion and the references in Cano Bazaga, "La Doble Nacionalidad con los Países Iberoamericanos y la Constitución de 1978", in Carrasco Durán, Pérez Royo, Urías Martínez and Terol Becerra (coord.), *Derecho Constitucional para el Siglo XXI* (Navarra, Aranzadi. Vol. 2. 2006), 1905-1918.

181 Rubio Marìn and Sobrino, "Country Report: Spain" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/Spain.pdf, 23.

182 The Treaties, or the protocols thereto, do not themselves have an impact on the conditions for the acquisition of nationality, but they certainly make it more attractive to acquire a second nationality.

Treaty on dual nationality with Argentina has led to a significant increase in the number of Argentineans applying for a Spanish passport.[183]

This wide access to the Spanish nationality may well be felt in significant part by Member States other than Spain,[184] which will be required, by virtue of the provisions on Union citizenship, to open up their borders to the Spanish citizens concerned. One can readily imagine that this will lead to political pressure on Spain by other Member States to make its nationality provisions more restrictive, in particular because they have to accept as Union citizens Spanish nationals with no substantial links to Spain. Remarkably, however, it appears that, to the difference with the Irish case, other Member States have not yet applied political pressure on Spain to this purpose. The Commission too, at present, appears to lack any interest in intervening in the Spanish flexible policy on nationality.[185] Somewhat paradoxically, the recent relaxation of the Spanish rules on dual nationality has been explained as partly having been caused by the judgment in *Micheletti*. Indeed, it has been argued that Spain has interpreted the Court's judgment as an approval of cases of two "active nationalities and as guaranteeing complete autonomy in nationality matters.[186] One could add that the Court's acceptance of the Italian interpretation of the Treaty at stake in *Micheletti* - which was very similar to the Spanish Treaties on dual nationality - as guaranteeing Italian nationality even in the absence of any domicile in Italy was a strong argument in Spain's favour in this connection.

Be that as it may, it cannot be excluded that in the foreseeable future Spain may be under pressure to tighten its nationality rules, for instance, by being more insistent on a certain connection with the Spanish territory as a condition to acquire the Spanish nationality. In this regard, one could see a limited precedent in the Spanish amnesty for illegal immigrants, which resulted in 700,000 illegal immigrants obtaining legal residence in Spain.[187] This provoked very negative reactions from other Member States, France in particular, and led to pressure on the Spanish government to change its plans, although Spain did not eventually abandon them. Admittedly, the 2005 amnesty did not confer Spanish nationality, but, given the possibility of residence-based acquisition of Spanish nationality and the lenient conditions in this regard for Latin-American nationals described above, it may eventually have led to many formerly illegally residing persons obtaining Union citizenship. If certain Member States are in the future confronted with a mass influx of "Latin-American" Spanish citizens, they may well have a similar reaction and it may well be that Spain will this time have to give in and reconsider its position. Moreover, below I will argue that, in extreme cases, the conferral of the Spanish nationality upon persons possessing no real links with the Spanish territory may constitute a violation of the principle of sincere cooperation.[188]

---

183 De Groot, "Latin-American European Citizens: Some Consequences of the Autonomy of the Member States of the European Union in Nationality Matters (editorial)" (2002) 9 *MJ*, 120.

184 A parallel can be drawn with the Treaty between Italy and Argentina at stake in the *Micheletti* case. Given the close cultural and linguistic ties between Argentina and Spain, many Argentineans entitled to Italian nationality would likely opt to go to Spain rather than to Italy.

185 Margiotta and Vonk, "Nationality Law and European Citizenship: the Role of Dual Nationality" (2010) EUDO Citizenship Working Paper, available at http://eudo-citizenship.eu/docs/RSCAS%202010_66.pdf, 17.

186 Vonk, "Latijns-Amerikaanse Spanjaarden en het Europees burgerschap" (2006) *Migrantenrecht*, 195.

187 See the discussion in Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2007) *Tul. Eur. & Civ. L.F.*, 123-125.

188 *Infra*, under V.C.4.

B. Loss of nationality

1. Outline

A question which is even more difficult to answer is whether Union law, through the provisions on Union citizenship, sets in motion an interplay between Member States which may result in pressure on certain Member States to change their rules regarding loss of nationality. One could assume that loss of the nationality of one Member State may, through the concept of Union citizenship, have important consequences for other Member States. The reason is that withdrawal of Member State nationality would seem, *prima facie* at least, to result in most cases for the persons concerned in the loss of their Union citizenship an, hence, of the rights they enjoy under the Treaties in the territory of the Member States. This would only seem to be different where the person(s) concerned would preserve or at the same time acquire the nationality of another Member State. Consequently, one could expect there to be an interplay between Member States which could lead to political pressure on some Member States to change their laws and practices regarding loss of nationality, similar to what was explained above in the context of rules on acquisition of Member State nationality.[189] More in particular, if one Member State were to adopt rules or practices on loss of nationality which, in the view of one or more other Member States, would violate certain fundamental rights, values or principles, it may well come under political pressure to change them.

However, one should be careful in drawing this parallel with cases of acquisition of Member State nationality, for three main reasons. First of all, it is not immediately clear whether loss of Member State nationality, in those cases where it is not accompanied by the acquisition or preservation of another Member State nationality, automatically leads to loss of Union citizenship and, therefore, has the Union-wide consequences just described. The reason for doubting this is that Article 20(1) TFEU, states that "Every person holding the nationality of a Member State shall be a citizen of the Union", but does not state, conversely, that persons not holding Member State nationality are not Union citizens.[190] Moreover, some scholars have advocated a decoupling of Union citizenship and Member State nationality in cases of loss of nationality and have argued that loss of Member State nationality does not automatically lead to loss of Union citizenship.[191]

I submit that, at present – and without considering plausible or desirable future developments for a moment –, loss of one's only Member State nationality will automatically entail loss of Union citizenship.[192] Such would seem to be the most natural interpretation of Article 20(1) TFEU. Furthermore, it is clear from the context surrounding the introduction of Union citizenship that Member States intended to confer that status only on nationals of the Member States. Holding differently would come down to acknowledging that individuals holding only the nationality of a third State or even no nationality at all could also have the status of Union citizen. That holding would open the door to giving Union citizenship a completely independent meaning from the nationality of the Member States, an avenue which the Member States clearly wanted to foreclose. It would, moreover, potentially cause significant

189 *Supra*, under IV.A.

190 Although this is generally accepted to be the case (see the discussion below).

191 See *inter alia* Kostakopoulou, "European Union Citizenship: the Journey goes on ", in Ott and Vos (eds.), *Fifty Years of European Integration* (The Hague, T.M.C. Asser Press, 2009), 271-290. See the discussion under VI., *infra*.

192 See also my analysis of the Union law consequences of withdrawal measures that violate certain Union limitations described below (see under V.C. and V.D., *infra*).

practical problems.[193] Indeed, a Union citizen who is not a national of one of the Member States would not be guaranteed residence in the European Union. He would not have a "home Member State" which would have to allow him on its territory and neither would other Member States where he would not satisfy the conditions of Directive 2004/38.[194] Not surprisingly, the ECJ, in its case law until now, has taken for a fact that loss of Member State nationality will normally entail loss of Union citizenship.[195] At present, it can be safely concluded, therefore, that loss of one's only Member State nationality will lead to that person losing his Union citizenship, and thus have the Union wide consequences ascribed to it above. Nevertheless, the possibility cannot be excluded that future Union law will move into the direction of a refusal to give effect to the withdrawal of Member State nationality, at least as far as the consequences for Union citizenship are concerned, in those cases where the withdrawal was effected in violation of Union law.[196]

Second, it must be noted that the dynamics underlying the indirect influence deriving from Union citizenship discussed above were prompted in great part by the duty of unconditional recognition of Member State nationality. It is not obvious that this principle, as articulated by the Court in *Micheletti*, applies in the context of loss of Member State nationality. Put differently, the question is whether the Member States are under a duty, not only to unconditionally recognise the *conferral* of nationality by another Member State but, similarly, also the *withdrawal* of nationality by another Member State. Such would mean that a person whose nationality was withdrawn by one Member State could no longer be treated as a Union citizen – a status he or she formerly enjoyed under Article 20(1) TFEU – by the other Member States. By contrast, in the absence of a duty of unconditional recognition, other Member States could, under certain circumstances, refuse to recognise his or her loss of Member State nationality and continue to treat him or her as a Union citizen.

Prima facie, there are two important reasons for doubting whether the principle announced by the Court in *Micheletti*, should apply *mutatis mutandis* to cases of loss of nationality. In the first place, the *Micheletti* case, on its facts, was only concerned with the non-recognition of (Italian) nationality and not with the non-recognition of a loss of nationality. In this regard it must certainly be remarked that, although the ECJ referred to both loss and acquisition of nationality when confirming the competence of the Member States regarding nationality,[197] it did not make any reference to "loss of nationality" when enouncing the principle of unconditional recognition.[198] In the second place, in relation to acquisition of nationality, the duty of unconditional recognition serves to guarantee the possibility for the individual

193 Hall, "Loss of Union Citizenship in Breach of Fundamental Rights" (1996) 21 *E.L. Rev.*, 141.

194 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. L158/77.

195 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 42. See the detailed discussion of the *Rottmann* case (*infra*, under V.2.).

196 As was acknowledged by AG Poiares Maduro (Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 34, footnote 42). See the discussion under VI., *infra*.

197 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 10: "Under international law, it is for each Member State, having due regard to [Union] law, to lay down the conditions for the *acquisition and loss* of nationality." (italics added).

198 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 10: "However, it is not permissible for the legislation of a Member State to restrict the effects of the *grant* of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the [Treaties]" (italics added).

concerned to exercise his or her citizenship rights throughout the Union. With regard to loss of nationality, a duty of unconditional recognition would effectively guarantee the person concerned the loss of his Union citizenship and the associated rights throughout the Union. This may be undesirable, especially where other Member States consider that the individual concerned has lost his Member State nationality for reasons which are not acceptable to them.

Nevertheless, I think these objections are not altogether convincing and I submit that the duty of unconditional recognition should also apply with regard to cases of loss of nationality.[199] Above I considered in some detail that the duty of unconditional recognition could be convincingly defended on the ground that in the absence of such a duty the class of persons to whom Union rules apply could vary from one Member State to another and that such a situation would be at odds with the internal market, and, more broadly, with the objectives of a Citizens' Europe. The same argument could be used for defending a duty of unconditional recognition of loss of Member State nationality. If the person concerned were in some Member States still recognised as having the nationality of a Member State, and as a Union citizen therefore, but not in other Member States, his or her rights under Union law would vary from one Member State to another. That would be detrimental to the Union's aims of establishing an internal market and a Citizens' Europe. Besides, the principle of unconditional recognition serves to safeguard the principled competence of each of the Member States to regulate its nationality. It should be clear that, in this regard too, no distinction can be made between the competence with regard to acquisition of nationality and the competence with regard to loss of nationality.

Consequently, where one Member State withdraws its nationality, this should be unconditionally recognised by other Member States, as is the case with conferrals of nationality. Of course, nothing prevents a Member State to accord a person who does not have the nationality of a Member State the same rights under its internal law as persons who do have the nationality of a Member State. Accordingly, a Member State could choose to continue to treat a person who it considers to have unjustifiably lost his Member State nationality as a Union citizen in its internal legal order.

Third, withdrawal of nationality will not normally have the same worrying effects on other Member States as conferral of nationality. Indeed, it will not lead to an enlargement of the group of persons that can claim benefits in all the Member States, and hence not endanger the socioeconomic balance in those Member States.[200] Therefore, with regard to loss of nationality, the dynamics behind the interplay between Member States may be very different from those at play with regard to acquisition of nationality. At the same time, it must be remarked that other considerations, which apply specifically to cases of loss of nationality, may prompt a Member State to put political pressure on other Member States. In this regard, it must be pointed out that loss of Member State nationality, entailing loss of Union citizenship, has normally far worse consequences for the individual concerned. He or she will lose certain vital rights, with Union-wide consequences, in a way which is potentially even in violation of his or her fundamental rights. These considerations may bring a Member State to bring pressure upon another Member State to change its rules or policy regarding loss of nationality. Moreover, where a Member State would withdraw its nationality from substantial groups of people, such may threaten the cohesion in that Member State and hamper European

199 See also the discussion of the consequences of loss of nationality in violation of certain limitations set by Union law (*infra*, under V.D.2.).

200 On the potential worrying effects of conferral of nationality, *supra*, under IV.A.

integration. This too may be a concern that may lead Member States to react, certainly in view of possible spill-over effects.

The same considerations apply where a Member State refuses to confer its nationality on (groups of) individuals in a way which other Member States feel is contrary to certain fundamental values or principles. Here too, political pressure may ensue from the fact that these Member States consider that certain (groups of) individuals are unjustifiably being denied the benefits of Union citizenship. This will be illustrated by considering the situation in the Baltic States in some detail.

2. Situation in the Baltic States

Latvia is – together with Estonia (see the discussion, *infra*) – rather unique among the Member States in that its population is made up for a large part by "non-citizens".[201] This particular situation derives from the fact that during the Soviet rule a significant Russian-speaking minority had established itself in Latvia, partly as a result of a hidden agenda of "Russification".[202] In 1989, at the eve of independence,[203] ethnic Latvians accounted for only 52 % of the population, whereas ethnic Russians accounted for 34% of the population.[204] Upon its independence, Latvia relied on the principle of State continuity to grant citizenship only to individuals who had been Latvian nationals in 1940 and their descendants, *i.e.* only to individuals who satisfied strict *ius sanguinis* requirements.[205] Other residents, even second or third generation immigrants born and resident in Latvia, had to satisfy stringent naturalisation conditions in order to obtain citizenship. These conditions, including the requirement of command of the Latvian language, were impossible to satisfy for many ethnic Russians, many

---

201 For a detailed analysis of the Latvian nationality legislation and its historical development, see Kruma, "Country Report: Latvia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Latvia and the literature referred to; Guliyeva, "Lost in Transition: Russian-speaking Non-citizens in Latvia and the Protection of Minority Rights in the European Union" (2008) 33 *E.L. Rev.*, 843-869; Lottmann, "No Direction Home: Nationalism and Statelessness in the Baltics" (2008) 43 *Tex. Int'l L.J.*, 503-520; Ziemele, *State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law* (Leiden, Martinus Nijhoff, 2005), 424 pp; Hughes, "'Exit' in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration" (2005) *J.C.M.S.*, 739-762; Gelazis, "The European Union and the Statelessness Problem in the Baltic States" (2004) *Eur. J. Migration & L.*, 225-229. See also the analysis in Shaw *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge, Cambridge University Press, 2007), 329-343. My description of the situation in Latvia is loosely based on these different sources.

202 The immigration of ethnic Russians was coupled with the forced emigration within the USSR of important numbers of ethnic Latvians: Gelazis, "The European Union and the Statelessness Problem in the Baltic States" (2004) *Eur. J. Migration & L.*, 226. The Russification of Baltic States was also effected through language policies. See Green, "Language of Lullabies: The Russification and De-Russification of the Baltic States" (1997) 19 *Mich. J. Int'l L.* 219, at 233 *et seq*.

203 Latvia became independent from the Russian empire in 1918. It was occupied by the Soviet Union in 1939, after the conclusion of the famous Molotov-Ribbentrop Pact, and regained independence in 1991. This regained independence did not lead to the creation of a newly independent State. Rather, Latvia asserted that it had been independent since 1918 and that the Soviet era was a period of "interrupted sovereignty".

204 See the figures cited in "Enacting EU Citizenship in Latvia: the Case of Non-Citizens" (2008) *ENACT WP 8*, *available at* http://www.enacting-citizenship.eu/index.php/sections/deliverables_item/129/, 6.

205 With certain exceptions, for instance for persons born and residing in Latvia whose parents were unknown. See Kruma, "Country Report: Latvia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Latvia, 3-4.

of whom were not, moreover, all that keen on becoming Latvian nationals.[206] As a result, substantial numbers of residents in Latvia remained stateless. Under international pressure to avoid statelessness, Latvia introduced in 1995 the special status of "non-citizen" for former USSR nationals and their descendants resident in Latvia, on condition that they do not hold the nationality of another State. "Non-citizens" obtain a special passport and enjoy important rights, such as the right not to be deported, the right to diplomatic protection and fundamental rights. They do not, however, enjoy most political rights and are barred from practicing certain professions.[207] Very important, moreover, is that veterans of the Soviet military and their family members are excluded from this status and from the possibility to naturalise.

Similar historical events explain the current Estonian nationality laws.[208] Just like Latvia, Estonia was confronted with a "Russification" agenda during the Soviet era. In 1989 only 61.5 % of its population consisted of ethnic Estonians, down from 97.3 % in 1945.[209] After regaining independence, Estonia revived its pre-Soviet nationality legislation, granting citizenship only to ethnic Estonians and their descendants, coupled with restrictive possibilities for naturalisation. As in Latvia, many of the mostly Russian immigrants and their descendants do not satisfy these conditions, or choose not to naturalise. To counter this situation of statelessness, Estonia has offered "alien's passports" to former USSR nationals with no other nationality and to their descendants. As such, non-citizen residents[210] enjoy important rights such as the right to vote in local elections and the right to unrestricted travel. Still, they are denied important political rights (such as the right to participate in national elections) and are denied access to certain jobs. Again, certain categories of persons, notably former members of the Soviet army or individuals believed to have worked against Estonian independence, and their family members, have virtually no possibility to obtain Estonian citizenship.

The situation in Lithuania is different from that in Latvia and Estonia in that a much smaller percentage of its post-independence population was ethnically Russian and that it has, *inter alia* for that reason, adopted much less restrictive nationality laws, allowing most Soviet era immigrants to obtain citizenship.[211] For this reason, the situation in Lithuania will not be considered further in the following.

It is clear from the foregoing that substantial numbers of residents in Estonia and Latvia are stateless in the sense that they do not have the nationality of either Estonia or Latvia or of a

---

206 On the reasons for this, see Lottmann, 510-513.

207 Kruma, "Country Report: Latvia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Latvia, 6-7.

208 See, besides the references in n. 201, *supra*, Poleshchuk and Järve, "Country Report: Estonia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Estonia and the literature referred to. For an analysis of the historic background to Estonian citizenship policies, see Visek, "Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia" (1997) *Harv. Int'l LJ.*, 315-374. My description of the situation in Estonia is loosely based on these different sources.

209 Figures cited in Visek, "Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia" (1997) *Harv. Int'l LJ.*, 321.

210 In literature on Estonia, non-citizens are often referred to as residents "with undefined/undetermined citizenship". I will refer to them as "non-citizens" in order to have a uniform terminology for the discussion of both Baltic States below.

211 Lottmann, "No Direction Home: Nationalism and Statelessness in the Baltics" (2008) 43 *Tex. Int'l L.J.*, 509-510. For a detailed discussion of Lithuanian nationality law and its historical development, see - besides the references in n. 201, *supra* - Kuris, "Country report: Latvia" (2010) *EUDO citizenship observatory*, *at* http://eudo-citizenship.eu/country-profiles/?country=Lithuania.

third country, even though they may enjoy rights which to an important extent resemble those of nationals of these countries. This group consists mostly of individuals belonging to the Russian-speaking communities who do not satisfy the burdensome requirements for naturalisation or deliberately choose not to naturalise, *inter alia* because such might deteriorate their relation with Russia.[212] Besides, large numbers of residents of Latvia and Estonia are foreign nationals, mostly Russians, who can, given the impossibility of dual nationality in Latvia and Estonia, not obtain the nationality of their country of residence without losing their foreign nationality. In 2009, 7,6 % of the Estonian population consisted of stateless former USSR citizens and 8,4 % were citizens of foreign states, mostly Russians.[213] In 2008 in Latvia, those percentages were at 17,3 and 2.0, respectively.[214]

Stateless persons, even those holding an alien's passport, do not have the nationality of their Member State and are not Union citizens therefore.[215] This means that they cannot exercise the rights associated with Union citizenship in the different Member States. Accordingly, they cannot participate in local and European Parliamentary elections (Article 22(2) TFEU[216]), they are not entitled to diplomatic protection by the authorities of other Member States in third countries (Article 23 TFEU) and they cannot challenge their exclusion from the possibility to practice certain jobs, as nationals from other Member States could.[217] More importantly still, they do not enjoy the right to equal treatment laid down in Article 18 TFEU and the right to free movement laid down in Article 21 TFEU, unless they are a family member of a "moving Union citizen".[218] With regard to Article 21 TFEU it must be remarked, however, that Estonian and Latvian non-citizens are exempt from visa requirements within the Schengen zone. Indeed, Regulation 539/2001[219] was amended in 2006 and now exempts "stateless persons and other persons who do not hold the nationality of any country who reside in a Member State and are holders of a travel document issued by that Member

---

212 Lottmann notes in this regard that it is easier for non-citizens to travel to Russia (for instance in order to visit family members) than for Baltic nationals (Lottmann, "No Direction Home: Nationalism and Statelessness in the Baltics" (2008) 43 *Tex. Int'l L.J.*, 513).

213 Figures cited in Poleshchuk and Järve, "Country Report: Estonia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Estonia, 4.

214 See the figures cited in "Enacting EU Citizenship in Latvia: the Case of Non-Citizens" (2008) *ENACT WP 8*, *available at* http://www.enacting-citizenship.eu/index.php/sections/deliverables_item/129/, 15.

215 See the Commission reply of 3 February to Petition 0214/2005 by Nadya Yasinsky (stating that Latvian non-citizens are not citizens of the Union and setting out the scope of their free movement rights on grounds of other provisions). See further the discussion in Van Elsuwege *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 434 *et seq.*

216 Article 22 TFEU is, by its wording, applicable to resident citizens from other Member States. Domestic Estonian laws allow non-citizens to participate in local elections. In Latvia they are denied the right to participate in both local and European Parliamentary elections. See Van Elsuwege *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 490-495.

217 It is settled case law that Member States may only reserve certain functions related to the exercise of official authority to their own nationals. See, *e.g.*, ECJ, Case 2/74 *Reyners* [1975] E.C.R. 631, paras 45-46.

218 Directive 2004/38 grants the right to family members to "accompany" or "join" a Union citizen in a Member State. In that Member State they also enjoy a right of equal treatment (Article 24 of Directive 2004/38). Clearly, however, these rights are derivative rights and cannot be exercised independently from those of the Union citizen concerned, for instance in another Member State than his or her Member State of residence. See Cambien, "Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform" (2009) 15 *Colum. J. Eur. L.*, at 338-341 and the sources referred to.

219 Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, [2001] O.J. L81/1.

State".[220] This amendment was introduced precisely to cover the case of non-citizens in Estonia and Latvia.[221] Accordingly, as far as short-period travel between Schengen States[222] is concerned, non-citizens are in a comparable position as Union citizens. For residence periods longer than three months, however, they can not rely on provisions comparable to the ones in place for Union citizens.[223]

Of course, non-citizens could, on the basis of Directive 2003/109,[224] obtain long-term resident status. That status would, in turn, give them the right to equal treatment and the right to residence in other Member States for longer periods.[225] However, both rights are subject to important restrictions and pale in comparison to the corresponding rights enjoyed by Union citizens.[226] The right to equal treatment enjoyed by long-term residents is limited to certain fields and can be subjected to important restrictions by the Member States.[227] Member States may, for instance, require proof of appropriate language proficiency for access to education and training.[228] Long term residents and their family members also enjoy a right of residence in other Member States[229] for periods exceeding three months. However, again, this right can be made subject to important limitations which cannot be imposed vis-à-vis Union citizens. Member States may, for instance, limit the total number of persons entitled to be granted a right of residence or make residence subject to compliance with integration measures.[230] Moreover, this right of residence does not extend to persons moving to another Member State in order to pursue studies or vocational training.[231] Besides, the circle of "privileged family members" is defined more narrowly than in the case of Union citizens.[232]

---

220 See the amendment introduced by Article 1 (b) of Council Regulation (EC) No 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, [2006] O.J. L405/23.

221 Van Elsuwege *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 444-446.

222 At the moment of writing, this includes all Member States except for Ireland and the United Kingdom (who do not take part in the Schengen *acquis*) and Bulgaria, Cyprus and Romania (who have not yet implemented the *acquis*). It also includes Iceland, Norway and Switzerland.

223 See Article 7 of Directive 2004/38.

224 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] O.J. L16/44. According to Article 2) (a) "'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty [*now Article 20(1) TFEU*]". Accordingly the Directive applies to non-citizens in Latvia and Estonia, even though they do not, strictly speaking, have the nationality of a third country.

225 See the discussion in Van Elsuwege *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 437 *et seq.*

226 See the analysis by Halleskov, "The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality" (2005) 7 *Eur. J. Migration & L.*, 181-201 and Boelaert-Suominen, "Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who Are Long-Term Residents: Five Paces Forward and Possibly Three Paces Back" (2005) *CML Rev.*, 1011-1052.

227 Article 11 of Directive 2003/109. Article 11(5) provides that Member States may extend the right to equal treatment further than the fields mentioned.

228 Article 11(3)(b) of Directive 2003/109.

229 But not in Denmark, Ireland and the United Kingdom, as they are not bound by the provisions of the Directive.

230 Articles 14(3) and 15(3) of Directive 2003/109.

231 Article 3(2)(a) of Directive 2003/109.

232 See Article 16 of Directive 2003/109, referring to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12.

The biggest problem, perhaps, is that obtaining the status of long-term resident itself can be rather burdensome. Generally, the status can be obtained after five years of legal and continuous residence in a Member State and on condition that the person concerned has sufficient resources for himself and his family members and has sufficient sickness insurance.[233] However, a Member State may also require compliance with integration conditions, such as language exams. It appears that in Estonia[234] and Latvia[235] proof of sufficient command of the national language is required in order to obtain permanent resident status under Directive 2003/109. This is significant, because precisely knowledge of one of the Baltic languages is a sore point for Russian-speaking minorities, who may, for that reason, see themselves excluded from the status of EU long-term resident.

This situation is worrisome from the point of view of European integration and the objectives of a Citizens' Europe, such as social cohesion and political integration.[236] A situation in which substantial groups of residents in a Member State are denied Member State nationality and access to some of the basic rights associated with Union citizenship goes directly against the idea of establishing an ever closer union among the peoples of Europe.[237] It would only be normal then if the EU and the Member States were to bring pressure on Estonia and Latvia to change their citizenship policies and widen access to their nationalities for non-citizens and stateless persons resident in their territories. All Member States have an interest in this, because problems with European integration can be expected to affect the political cohesion of the Union and disturb the functioning of the internal market. Moreover, the situation of the Russian-speaking minorities affects the EU's relation with Russia.[238]

It appears that the EU has had a bearing on citizenship policies during the pre-accession stage, *i.e.* in the process leading up to Estonia and Latvia joining the Union as full-blown Member States,[239] although the significance of the EU's influence is disputed.[240] In this connection, it

---

233 Articles 4 and 5(1) of Directive 2003/109.

234 See the website of the Estonian Police- and Border Guard Board: http://www.politsei.ee/en/teenused/residence-permit/long-term-residence-permit/. The language requirements only apply, however, for the future (from 1 June 2006 onwards) and do not therefore affect the possibilities for Soviet era immigrants to obtain EU long-term residence status.

235 See the website of the Office of Citizenship and Migration Affairs: http://www.pmlp.gov.lv/en/pakalpojumi/eiropa.html.

236 The promotion of cohesion and integration are fundamental objectives of the Union, as is clear from Article 3(3) TEU and Title XVIII of the TFEU and from the preamble to the TEU). The aims of fostering social cohesion and integration are also expressly stated in recitals 17 and 18 to the preamble of Directive 2004/38 (see, in this connection, ECJ, Case C-162/09 *Lassal* [2010] E.C.R. nyr., paras 32 and 53). Arguably, a situation in which large numbers of residents of a country are denied important political rights and access to certain professions is detrimental to political integration. The fact that these residents do not enjoy these rights in contrast to other residents also hampers the social cohesion of the population of that country and, thereby, of the European Union. Admittedly, these arguments do not just apply with regard to "non-citizens", but equally hold good with regard to third country nationals. The growing discrepancy between the rights enjoyed by Union citizens and those enjoyed by third country nationals has frequently been denounced in this light, and rightly so. Still, the problems stated are particularly pressing with regard to non-citizens, since they presumably enjoy lesser rights than third-country nationals, for instance as far as diplomatic protection is concerned, and are denied the realistic possibility to acquire the nationality of the country they are resident in.

237 See the preambles to the TEU and TFEU and Article 1, second para., TEU.

238 As was already clear from the "medium-term strategy for the development of relations between the Russian Federation and the European Union (2000-2010)". For an illustration of tensions between the EU and Russia caused by the situation of Russian minorities in the Baltic States, see "EU-Russian talks end in acrimony", *BBC News* 18 May 2007, *available at* http://news.bbc.co.uk/2/hi/europe/6668111.stm.

239 See, on this subject, Sasse, "The politics of EU conditionality: the norm of minority protection during and beyond EU accession" (2008) 15 *Journal of European Public Policy,* 842-860; Van Elsuwege *From*

must be remarked that the Accession Partnership Agreements with Estonia and Latvia, which were followed up and assessed by the Commission, provided for enhanced minority protection.[241] There is in any event a good case for arguing that some of the changes in Latvian and Estonian nationality legislation in the nineties, to the effect of a relaxing of naturalisation requirements, have been strongly influenced by the monitoring by the Commission of the accession process and the regular Commission progress and monitoring reports.[242] Here I am concerned, however, with the possible influence of Union law on the nationality laws of Member States, not candidate Member States. The point will not be further elaborated therefore.

Since the accession of Latvia and Estonia, the EU has fewer mechanisms to influence the citizenship policies in these countries. Indeed, it is no longer possible to use EU Membership as a "carrot" in order to induce or even force certain changes in nationality legislation. The EU has even been said to no longer play any role at all in relation to naturalisation and integration issues in the Baltic States.[243] Some have even argued that accession to the EU is seen by Estonia and Latvia as the ultimate approval of their citizenship policies.[244] It appears indeed that the Commission is no longer applying concrete pressure on these Member States. In this connection it must be noted that, as a result of their accession to the EU, the Commission no longer issues regular reports on the situation in the Baltic States. Nonetheless, the accession of Latvia and Estonia can in no way be taken to mean that the EU and its Member States have no more role to play in this regard and can no longer demand from Estonia and Latvia to further relax their naturalisation requirements.[245] It appears that the Commission is still closely watching the citizenship policies in these countries and its implications for a Citizens' Europe. In fact, the Commission, in its 2008 report on citizenship of the Union explicitly expressed concern over the situation[246]:

Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 268-275; Gelazis, "The European Union and the Statelessness Problem in the Baltic States" (2004) 6 *Eur. J. Migration & L.*, 226-232. For a general study of the EU's influence on the rules and policies of candidate countries, see Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan den Rijn, Kluwer Law International, 2008), 358 pp.

240 See the references cited in Van Elsuwege *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 268.

241 Respect for and protection of minorities is one of the so-called "Copenhagen criteria". For a discussion, see Hillion, "Enlargement of the European Union: The Discrepancy between Membership Obligations and Accession Conditions as regards the Protection of Minorities" (2003) *Fordham Int'l L.J.*, 715-740.

242 See the discussion and references in Van Elsuwege *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 269-275. For an example of a Commission monitoring report mentioning the issue, see the Comprehensive monitoring reports on Estonia's and Latvia's preparations for membership, both *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_2003_en.htm (strongly encouraging both countries "to promote integration of the Russian minority by, in particular, continuing to accelerate the speed of naturalisation procedures, and by taking other proactive measures to increase the rate of naturalisation").

243 Kruma, "Country Report: Latvia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Latvia, 18.

244 Poleshchuk and Järve, "Country Report: Estonia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Estonia, 13.

245 See the informative discussion (approaching the issue from the angle of "minority rights") in Guliyeva, "Lost in Transition: Russian-speaking Non-citizens in Latvia and the Protection of Minority Rights in the European Union" (2008) 33 *E.L. Rev.*, 854-867.

246 Fifth Report from the Commission on Citizenship of the Union (1 May 2004 – 30 June 2007), COM(2008) 85 final, 3 (bold words as they appear in the original).

> "In particular, the Commission is aware of questions related to persons belonging to the Russian-speaking minority in **Estonia and Latvia** who are considered to be '**non-citizens'** […]"

The Commission at the same time, acknowledging that it had no direct power to regulate nationality, stated that it had nevertheless sought, using the powers at its disposal:

> "to contribute to solutions linked to this issue by promoting integration and by using the [Union] instruments at its disposal such as ensuring that Member States strictly implement [EU] anti-discrimination legislation."[247]

The situation of Russian-speaking minorities is also closely watched by the European Union Agency for Fundamental Rights.[248]

There is no reason why, as both the Union citizenship and fundamental rights *acquis* are very dynamic and having an ever greater impact on the rules and policies of the Member States, the Commission and other Member States could or would not bring pressure on Estonia and Latvia to bring the current situation of large numbers of stateless residents to an end. Below [249] I will argue that a refusal of Member State nationality can, under certain circumstances, be considered to fall within the scope of Union law, and, hence, must respect certain limitations deriving from Union law. I will not develop the point further here. I just want to point out that certain Union principles would *prima facie* seem relevant as regards the situation in Estonia and Latvia, such as the duty to respect fundamental rights, in particular the right to nationality and the right to respect for family life,[250] the principle of non-discrimination,[251] in particular on grounds of race, and the principle of proportionality.[252] Below, I will argue that the Commission (or another Member State) could bring an infringement action where one of these principles is violated. The prospect of such actions would seem to significantly enhance the effectiveness of political pressure and help to induce the desired changes in Estonia's and Latvia's citizenship policies.

V DIRECT LIMITATIONS FLOWING FROM UNION CITIZENSHIP

A. Due regard to Union law

247 *Ibid.*

248 See the EU-MIDIS: European Union Minorities and Discrimination Survey, Main Results Report, *available at* http://fra.europa.eu/fraWebsite/eu-midis/index_en.htm, 176 *et seq*.

249 See the discussion under V., *infra.*

250 Several cases have already been brought before the ECtHR by stateless residents against Latvia. So far, the Court has never concluded that there was a breach of the ECHR. For a discussion, see Thym, "Respect for private and family life under article 8 ECHR in immigration cases: a human right to regularize illegal stay?" (2008) 57 *I.C.L.Q.,* 87-112. See also the discussion (from an international law perspective) in Ziemele *State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law* (Leiden, Martinus Nijhoff Publishers, 2005), 314-327.

251 See the discussion in Van Elsuwege *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 428-434; Ziemele *State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law* (Leiden, Martinus Nijhoff Publishers, 2005), 332-340.

252 It could be argued, for instance, that the exclusion of family members from ex Soviet soldiers who were born and reside in Estonia and Latvia from the possibility of acquiring nationality is in violation of the principle of proportionality.

1. An enigmatic phrase

As was pointed out above, the ECJ has confirmed the competence of the Member States to regulate nationality, but at the same has time made it subject to an important proviso. The famous dictum from the *Micheletti* case reads: "Under international law, it is for each Member State, *having due regard to [Union] law*, to lay down the conditions for the acquisition and loss of nationality".[253] It clearly appears from this dictum that there is room to argue that Union law sets direct limitations to the competence of the Member States to determine nationality. Such is true, in line with the dictum, both with regard to their competence to lay down rules concerning acquisition of nationality and for their competence to lay down rules concerning loss of nationality. However, while in the almost 20 years following *Micheletti*, the ECJ repeated this dictum in a number of cases,[254] it had never clarified its meaning by stating what principles of Union law Member States must respect in this connection or found a Member State's nationality legislation to be in breach of Union law. This led to a vivid debate in legal literature about the possible meaning and significance of the dictum.[255]

In its *Rottmann* judgment[256] of 2 March 2010, the ECJ for the first time clarified to some extent the meaning of the phrase "having due regard to Union law". Furthermore, in that case it examined for the first time the compatibility of Member State nationality legislation with fundamental principles of Union law.[257] The *Rottmann* case is no doubt a landmark case. Its contribution to clarifying the on this point ambiguous case law should not be underestimated. At the same time, the case does far from bringing the academic debate to an end. First of all, "one swallow does not make a summer". It would be unwise to build too much reliance on one case, given that the ECJ could in the (near) future implicitly revise or explicitly overturn this case.[258] One commentator even calls on the Member States to amend the Treaties in order to correct the Court's erroneous interpretation of the Treaties in *Rottmann.*[259] Besides,

---

253 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 10 (italics added).

254 ECJ, Case C-179/98 *Mesbah* [1999] E.C.R. I-7955, para. 29; ECJ, Case C-192/99 *Kaur* [2001] E.C.R. I-1237, para. 19; ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 37.

255 See, for instance, the longstanding debate in the Netherlands between De Groot (see De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF and the literature cited therein) and Jessurun d'Oliveira (see *inter alia* Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 395-412).

256 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449., with case notes by Cambien in (2011) 17 *Colum. J. Eur. L.,* 375-394 and in (2010) *SEW*, 379-382; De Groot in (2010) *Asiel & Migratierecht,* 293-300; De Groot and Selling in (2011) *EuConst,* 150-160; Jessurun d'Oliveira in (2010) *NJB,* 1028-1033 and in (2011) *EuConst,* 138-149; Kochenov in (2010) 47 *CML Rev.,* 1831-1846; Mouton in (2010) *Revue de Droit International Public,* 257-280; Oosterom-Staples in (2010) *N.T.E.R.,* 188-194.

257 As I have explained above, in *Micheletti*, the Court did not so much scrutinise Spanish nationality legislation, but rather imposed on Spain the duty to unconditionally recognise the *Italian* nationality of Mr. Micheletti. Accordingly, *Micheletti* did not invalidate provisions of Spanish nationality legislation, although it cast doubt on the validity under Union law of certain provisions of the Spanish civil code. See the analysis by, Iglesias Buhigues, "Doble nacionalidad y derecho comunitario. A propósito del asunto C 369/90, Micheletti, sentencia del TJCE de 7 de Julio de 1992", in Perez Gonzalez and others (eds.), *Hacia un nuevo orden internacional y europeo. Homenaje al profesor M. Diéz de Velasco* (Madrid, Tecnos, 1993), at 966-967 in particular.

258 The latter scenario is very unusual, but does happen: see the explicit reversal of the *Akrich* case (ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607) in ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 58. See my case note in (2009) 15 *Colum. J. Eur. L.,* 321, at 341.

259 Jessurun d'Oliveira, "Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de *Rottmann* zaak" (2010) *NJB*, 1028, at 1033.

many questions remain unanswered even after *Rottmann.* In fact, the judgment raises a number of important new questions. Future cases will have to further clarify the Court's stance.

Given the importance of the *Rottmann* case to my analysis, I will first discuss the case in some detail. Next I will tackle the important question of the scope of Union law inroads into the nationality laws of the Member States, before discussing possible limitations with regard to, on the one hand, rules on acquisition of nationality and, on the other hand, rules on loss of nationality.

2. The Rottmann case

a) Judgment

The facts of the case are rather straightforward.[260] The applicant in the case, Mr. Rottmann, was an Austrian national by birth. In 1995, a case was brought against him before an Austrian criminal court on account of suspected serious fraud in his profession. In 1997, the criminal court issued a national warrant for the arrest of Mr. Rottmann. At that point in time, however, Mr. Rottmann no longer lived in Austria. He had moved to Germany in 1995, after the hearing before the criminal court. In 1998, Mr. Rottmann applied for German nationality and in early 1999 he effectively became a German national. A few months later, the Austrian authorities informed the German authorities of the criminal proceedings pending against Mr. Rottmann. The competent German authority (the Freistaat Bayern) reacted by withdrawing Mr. Rottmann's naturalisation with retroactive effect. It based this decision (*hereinafter* "withdrawal decision") on the fact that Mr. Rottmann had never disclosed during the naturalisation procedure that he was the subject of judicial investigation in Austria and that, by failing to disclose this relevant information, he had obtained German nationality by deception.

The withdrawal decision had rather disastrous consequences for Mr. Rottmann. As a consequence of his naturalisation he had lost his Austrian nationality, in accordance with both Austrian[261] and German[262] law. The withdrawal decision would strip him of his only remaining nationality, the German nationality. Moreover, under Austrian law, he could regain his Austrian nationality only under very burdensome conditions, which he did not appear to satisfy.[263] Consequently, the interplay of Austrian and German provisions on nationality in the circumstances of the case threatened[264] to render Mr. Rottmann stateless. The question the ECJ had to answer was whether this outcome was in accordance with Union

---

260 For a more detailed account, see my case note in (2010) *SEW*, 379-382.

261 Paragraph 27(1) of the Law on nationality (Staatsbürgerschaftsgesetz, BGBl. 311/1985) provides: "Any person who acquires foreign nationality at his own request, or by reason of a declaration made by him or with his express consent, shall lose his Austrian nationality unless he has expressly been given the right to retain [it]".

262 According to the applicable provisions of German law relating to nationality, naturalisation of an alien depended, as a rule, on his giving up or losing his previous nationality (ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 7).

263 See Article 10 of the Staatsbürgerschaftsgesetz, which requires, in principle, the absence of a criminal conviction of a certain gravity.

264 The effects of the withdrawal decision were suspended by the appeal brought against it by Mr. Rottmann. Accordingly, the effects of the decision under Austrian and German law had not yet materialised when the ECJ delivered its judgment.

law, in particular with the provisions on Union citizenship. The referring Court asked the ECJ to assess the validity of the provisions at stake of both the Austrian and the German nationality laws. This was the ideal scenario for the Court to clarify the meaning of its proviso "having due regard to Union[265] law".

Very important is that the Court started by tackling the question of admissibility,[266] namely by determining whether Union law was applicable to the dispute at all.[267] This was disputed by a number of Member States, on two grounds: on the one hand, because the rules on acquisition and loss of nationality fall within the competence of the Member States and, on the other hand, because the case concerned a "purely internal situation" since the withdrawal decision was taken by the German authorities vis-à-vis a German national. The Court firmly dismissed these arguments. It recalled, first of all, that the Member States, in situations covered by Union law, must exercise their competences – such as the one regarding nationality – with due regard to Union law. It found, moreover, that the situation at hand was one covered by Union law. It famously stated that:

> "the situation of a citizen of the Union who […] is faced with a decision withdrawing his naturalisation […] placing him […] in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto falls, *by reason of its nature and its consequences*, within the ambit of European Union law."[268]

This is a point of paramount importance, which I will come back to in more detail below.

Next, the Court assessed whether the withdrawal decision was taken in accordance with Union law.[269] The Court clarified that the principle that Member States must exercise their power regarding nationality with due regard to Union law enshrines the principle that the exercise of that power, "in so far as it affects the rights conferred and protected by the legal order of the Union", is amenable to judicial review carried out in the light of European Union law.[270] The Court accepted that withdrawal of nationality for reasons of deception could be compatible with Union law, since such corresponds to a reason relating to the public interest, namely the protection of the special relationship of solidarity and good faith between a Member State and its nationals. The Court found confirmation of this point of view in the relevant provisions of the Convention on the reduction of statelessness and of the ECN and in the general principle of international law that no one is arbitrarily to be deprived of his nationality.[271] The ECJ added, however, that, where the withdrawal of nationality has for a consequence that the person concerned loses his Union citizenship, this decision must respect the principle of proportionality, under Union law and, where applicable, also under national law. It was necessary, therefore, to balance the consequences of the withdrawal decision for the person concerned and his or her family members with regard to the loss of the rights enjoyed by every Union citizen against the gravity of the offence committed by that person,

---

265 The Court has, of course, consistently referred to "having due regard to *Community* law" because the facts of all the cases so far decided took place before the entry into force of the Lisbon Treaty. Because the Lisbon Treaty has now entered into force, I will consistently refer to "Union law" instead of "Community law".

266 Even though the judgment does not contain a separate section on "admissibility" in contrast with the Opinion of AG Poiares Maduro.

267 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 37-45.

268 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 42 (italics added).

269 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 46-59.

270 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 48.

271 Which, as the ECJ remarks, is reproduced in Article 15(2) of the UDHR and Article 4(c) ECN (ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 53).

the lapse of time between the naturalisation decision and the withdrawal decision and the possibilities for that person to recover his original nationality. The Court clarified that principle of proportionality would not be violated by the mere fact that the person concerned had not recovered his or her original nationality. Nevertheless, the principle could require the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.

Lastly, the ECJ considered whether, in the circumstances of the case, Austria was obliged to interpret its legislation in such a way as to allow Mr. Rottmann to recover his original nationality.[272] The Court merely remarked that it could not answer this question since the Austrian authorities had not yet taken a decision regarding the possible recovery of Mr. Rottmann's Austrian nationality, given the fact that the withdrawal decision had not yet become definitive. It could not, in other words, assess the validity under Union law of a decision not yet adopted. Still, the Court added that the principles enounced in the judgment with regard to the powers of the Member States in the sphere of nationality applied to both the Member State of naturalisation and to the Member State of the original nationality.

b) Appraisal

The *Rottmann* case is most probably the most important ECJ case in the field of nationality law since the classic *Micheletti* case. It has rightly been described as a landmark case,[273] providing a more than welcome clarification with regard to the relationship between Union citizenship, on the one hand, and the nationality laws of the Member States, on the other hand.[274] Curiously, the Court has been fiercely criticised for overstretching the reach of Union law,[275] and, at the same time, for not going far enough in its scrutiny on the compliance of national rules with Union law.[276] No wonder that the case has sparked a passionate academic debate (or, one might say, revived the academic debated set in motion by *Micheletti)* about the influence of Union law on the nationality laws of the Member States.[277]

As Davies has remarked, in common with other seminal cases, the Court has hung a far reaching judgment on a relatively innocuous and sympathetic fact set. Indeed, the *Rottmann*

---

272 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 60-64.

273 See Davies, "The Entirely Conventional Supremacy of Union Citizenship and Rights" (2010) *EUDO Citizenship Forum, available at* http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2. De Groot even labels *Rottmann* as a "classic of European jurisprudence" and as a judgment of the same rank as seminal cases like *Van Gend & Loos*, *Costa-Enel, Cassis de Dijon, Baumbast and Grzelczyk* (De Groot, "Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europees Hof van Justitie" (2010) *Asiel & Migratierecht*, 300).

274 See my case note in (2010) *SEW*, 381.

275 Jessurun d'Oliveira, "Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de *Rottmann* zaak" (2010) *NJB*, 1028-1033.

276 Kochenov, "Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters" (2010)*, available at* http://ssrn.com/abstract=1593220; Kochenov, "Case C-135/08 *Janko Rottmann* v. *Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported" (2010) 47 *CML Rev.*, 1842-1845 (denouncing the fact that the ECJ did not take a firm stance in protecting the individual concerned against statelessness).

277 Kochenov (writing before the *Rottmann* judgment was delivered) even remarked that this important topic has never enjoyed sufficient scholarly attention (Kochenov, "Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship" (2010) *EUI RSCAS Paper 2010/23, available at* http://cadmus.eui.eu/dspace/bitstream/1814/13634/1/RSCAS_2010_23.pdf, 1).

case is not so much important for its facts, which are in many respects rather unusual. The judgment is of utmost importance on a more principled level. The Court's reasoning is groundbreaking on two points. First of all, the Court's reasoning on the scope of Union law in the sphere of nationality laws is very innovative. Secondly, the judgment confirms the existence of direct Union law limitations to the Member State's competence and provides a first indication as to what these limitations are. For this reason the *Rottmann* judgment will be an important point of discussion throughout my analysis. In the following, I will first analyse whether and to what extent Union law is applicable (or should apply) to issues of Member State nationality (B). Next, I will discuss possible Union law limitations to the competence of the Member States as regards acquisition of nationality (C) and loss of nationality (D). Both issues, applicability of Union law and limits deriving from Union law, are to some extent intertwined. On an abstract level of reasoning, one could say that the nationality laws of the Member States fall within the scope of Union law to the extent that they infringe a principle of Union law. This principle, for example the free movement of persons, would then be a Union law limitation. However, this is not necessarily the case. Below I will advocate a systemic distinction between the scope of Union law and limitations deriving from Union law. This will allow me to treat both issues separately.

B. Applicability of Union law in the sphere of nationality

A preliminary point to any discussion about the influence of Union law on the nationality laws of the Member States is whether Union law is applicable at all in this field and, if so, to what extent. Logically speaking, this is a point that has to be addressed first, before discussing any possible limitations deriving from Union law. The point is highly controversial. Some commentators have argued that Union law has no role to play in this field because the competence of the Member States regarding nationality is an exclusive competence. Accordingly, some have criticised the Court's judgment in *Rottmann* as being an erroneous decision.[278] Others agree that Union law can have an impact on the nationality rules of the Member States but only in situations that present a clear link with Union law[279] – a link which is mostly thought of a "cross border" element – , and not in "purely internal situations".[280] I will now consider both these issues in some detail. My analysis will show that Union law does apply in the sphere of nationality legislation. Moreover I will argue that, as regards rules on acquisition or loss of nationality, conferral, refusal or loss of Member State nationality can in itself be a sufficient link to bring a situation within the scope of Union law when it has an impact on Union citizenship.

---

278 See Jessurun d'Oliveira, "Decoupling Nationality and Union Citizenship?" (2011) 7 *EuConst*, 139.

279 For a very interesting analysis of the link required with Union law in the case law of the ECJ, see Lenaerts, "Federalism and the Rule of Law. Perspectives from the European Court of Justice" (2010) *Fordham International Law Journal,* 1338-1387.

280 The competence-based argument should be distinguished from the argument based on the absence of a link with Union law, although both arguments are sometimes mixed. In *Rottmann* , for instance AG Poiares Maduro notes that it "seems to emerge from the observations of certain Member States, that the situation in this case is a purely internal one, on the pretext that the subject-matter of the proceedings, in this instance the acquisition and loss of nationality, is regulated exclusively by national law" (at para. 10). In my view, it would be better to reserve the label "internal" for situations which present no link with Union law, usually due to the absence of a "cross-border" element, and not apply it to competences which are said to be exclusive competences of the Member States. As we know, the fact that the Member States are competent to lay down rules in a given field does not have for a consequence that Union law is not applicable or should not be complied with.

1. Nationality as an exclusive competence of the Member States?

The argument that Union law cannot apply to the Member States' rules on nationality because the Member States are exclusively competent in this field is both a familiar one and an understandable one. The argument is familiar because it has since long been advanced in a well-known debate in legal literature between scholars defending the position that nationality belongs to the "reserved domain" of the Member States[281] and scholars defending the possibility that Union law sets direct limits to this competence.[282] The argument is understandable because it can be traced back to the fear of some Member States, described above, of Union law encroaching upon their competence regarding nationality, one of the key competences of sovereign states. The popularity of the argument in the Member States is illustrated by the fact that eight of the Member States made submissions to this effect in the *Rottmann* case.[283]

Nevertheless, the said argument is, in my view, rather besides the point. It is not helpful to classify certain competences as "exclusive Member State competences" or belonging to the "reserved domain". Of course, there are numerous fields which the Member States remain competent to regulate and in which the Union is not competent to lay down rules. Still, even in those fields, the Member States must exercise their competence with due regard to Union law. This is a natural imperative of the Union legal order, which flows from the primacy of Union law. It is inconceivable that Member States would, when laying down rules in fields in which the Union is not competent to do so, be entitled to deviate from Union rules in other fields or even enact rules that would put in peril the effectiveness of Union law. Past cases have made clear that Union law has to be respected by the Member States even in the fields of, *inter alia*, criminal legislation,[284] direct taxation,[285] rules governing a person's name,[286]

---

281 See, *inter alia*, Jessurun d'Oliveira, "Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de *Rottmann* zaak" (2010) *NJB*, 1033; Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 395, at 397 *et seq.*; Closa, "Citizenship of the Union and Nationality of Member States" (1995) 32 *CML Rev.*, 487, at 509-514; Kovar and Simon, "La citoyenneté européenne" (1993) *C.D.E.*, 285, at 289-295. It cannot be ignored that this view had far more proponents in the "initial years" of Union citizenship, and is not widely defended anymore at present, in particular since the *Rottmann* ruling.

282 See, *inter alia*, Kochenov, "Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship" (2010) *EUI RSCAS Paper 2010/23, available at* http://cadmus.eui.eu/dspace/bitstream/1814/13634/1/RSCAS_2010_23.pdf; Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2007) *Tul. Eur. & Civ. L.F.,* 89-156; De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL,* 1-37; Kotalakidis *Von der nationalen Staatsangehörigkeit zur Unionsbürgerschaft: die Person und das Gemeinwesen* (Baden-Baden, Nomos, 2000), at 605 *et seq.* in particular; De Groot, "The Relationship between the Nationality of the Member States of the European Union and European Citizenship", in La Torre (ed.), *European Citizenship: An Institutional Challenge* (The Hague, Kluwer Law International, 1998), 115-147; O'Leary *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), at 57 *et seq.*; Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), in particular at Chapter3; Marias, "From Market Citizen to Union Citizen", in Marias (ed.), *European Citizenship* (Maastricht, EIPA, 1994), 1-24, at 15; O'Leary, "Nationality Law and Community Citizenship: A Tale of Two Uneay Bedfellows" (1992) *YbEL*, 353, at 378-381 and, already, Evans, "Nationality Law and European Integration" (1991) 16 *E.L. Rev.*, 190-215.

283 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 37.

284 The ECJ has held for instance that "Although in principle criminal legislation and the rules of criminal procedure, among which the national provision in issue is to be found, are matters for which the Member States are responsible, the Court has consistently held that Union law sets certain limits to their power."

disability pensions for victims of war[287] and the organisation of social security schemes, [288] fields which the Member States without any doubt remain competent to regulate.[289] Consequently, there does not seem to be room anymore for competences which the Member States can exercise without having regard to at least certain principles or rules of Union law, which limit their discretion in the field. In that sense no competence can ever be labelled an exclusive Member State competence. As Lenaerts has famously stated: "There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the [Union]".[290] Of course, one could reserve the label "exclusive Member State competence" for fields in which the Union is not competent to lay down rules as such,[291] but in which general principles of Union law and Treaty provisions nevertheless have to be complied with. This use of the term is not entirely accurate and, in my view, rather confusing. Moreover, it is somewhat dangerous to use the label, as it seems to refer to a *status quo*, a sort of fossilised categorisation of competences, and such does not do justice to the dynamic nature of the Union legal order.

It cannot readily be seen why the foregoing considerations should not apply with regard to the competence to lay down the rules on acquisition or loss of nationality. As in all other fields, Member States must exercise their competence regarding nationality with due regard to Union law – be it only, of course, in situations that fall within the scope of Union law, an issue that will be discussed under "2". Accordingly, the *Micheletti* dictum requiring the Member States to have "due regard to Union law" seems to be no more than a specific expression of the case law just referred in the field of nationality law, as was rightly remarked by the ECJ in *Rottmann.*[292] Jessurun d'Oliveira has objected that the parallel with the said case law is erroneous, since that case law concerns the scope of Union citizenship and the rights attached to it and not the conditions governing the acquisition and loss of Union citizenship. According to that author, the latter remain determined exclusively by the nationality laws of the Member States without any limitation deriving from Union law. Still according to that author, nationality legislation must have this "privileged position" because if it would be

---

See ECJ, Case 186/87 *Cowan* [1989] E.C.R. 195, para. 19; ECJ, Case 203/80 *Guerrino Casati* [1981] E.C.R. 2595, para. 27.

285 See, *e.g.*, the *Turpeinen*-judgment, where the ECJ observed: "while in the present state of [Union] law direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence in accordance with [Union] law, in particular the provisions of the [Treaties] concerning the right of every citizen of the European Union to move and reside freely within the territory of the Member States (ECJ, Case C-520/04 *Turpeinen* [2006] E.C.R. I-10685, para. 11). For another example, see ECJ, Case C-403/03 *Schempp* [2005] E.C.R. I-6421, para. 41.

286 ECJ, Case C-353/06 *Grunkin and Paul* [2008] E.C.R. I-7639, para. 16; ECJ, Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, para. 26.

287 ECJ, Case C-192/05 *Tas-Hagen and Tas* [2006] E.C.R. I-10451, paras 21-22. See also ECJ, Case C-221/07 *Zablocka-Weyhermüller* [2008] E.C.R. I-9029, paras 27-28; ECJ, Case C-499/06 *Nerkowska* [2008] E.C.R. I-3993, paras 23-24.

288 ECJ, Case C-135/99 *Elsen* [2000] E.C.R. I-1049, para. 33.

289 See also the discussion in Van Nuffel and Cambien, "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren" (2009) 57 *SEW*, 143, at 148-150.

290 Lenaerts, "Constitutionalism and the Many Faces of Federalism" (1990) 38 *Am. J. Comp. L.*, 205, at 220. For critical reflections on that view, see Dashwood, "The Limits of European Community Powers" (1996) 21 *E.L. Rev.*, 113, at 114 *et seq.*; Majone, "Europe's 'Democratic Deficit': the Question of Standards" (1998) 4 *E.L.J.,* 5, at 8 *et seq.*

291 It clearly follows from the Treaties that the Union is not competent to regulate certain fields. Since the Lisbon Treaty it is specified that the Union cannot rely on the flexibility clause of Article 352 TFEU to adopt rules in these fields.

292 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 41. See also Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449,, para. 20.

(even partially) governed by Union law, such would endanger the existence and identity of the Member States or their autonomous status as States.[293] In my view, this argument is not conclusive. Even if we accept that the case law discussed in the previous paragraph applies to nationality legislation, Member States remain competent to determine who their nationals are and have not, therefore, lost their sovereignty or statehood for this reason. At the same time, it must be acknowledged that the EU Member States have partially replaced their independence with interdependence, in the framework of the European Union. They will therefore, when exercising their sovereign powers, inevitably have to take into account certain imperatives deriving from the Union legal order. It would be wrong to exempt nationality law from this obligation, since Member State nationality is one of the key concepts of the Union legal order, giving entitlement to the fundamental status of the nationals of the Member States, Union citizenship. It follows from the case law referred to above that Member States may not, in the exercise of their competence, enact rules that are liable to hinder or make less attractive the exercise of the rights attached to Union citizenship.[294] *A fortiori*, Member States cannot at liberty regulate the very status that gives entitlement to these rights.[295]

Another objection to applying the said case law to Member State nationality legislation is that Article 20(1) TFEU explicitly defines Union citizenship with regard to Member State nationality and that both a declaration annexed to the Treaties and a decision of the Heads of State or Government meeting within the European Council[296] state that Member State nationality is to be determined solely by reference to the national law of the Member State concerned. However, it does not follow from these provisions, and certainly not from Article 20(1) TFEU, that the nationality legislation of the Member States can entirely disregard fundamental principles of Union law. Such authorisation could never flow from the said declaration and decision, as they rank lower in the hierarchy of Union law than Treaty provisions and general principles of Union law. As discussed higher, these instruments have a significant authoritative value for the interpretation of the Treaties,[297] as was explicitly acknowledged by the ECJ in *Rottmann*.[298] They cannot, however, be a basis, for shielding nationality law from the imperative inherent in the Union legal order of "having due regard to Union law".

In my view, it follows that Union law can set limitations to the competence of the Member States regarding nationality. In that sense, nationality is not an exclusive Member State

---

293 Jessurun d'Oliveira, "Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de *Rottmann* zaak" (2010) *NJB,* 1033. The argument is also made in earlier works by the author (*e.g.* Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 410-411) and in Evans and Jessurun d'Oliveira, "Nationality and Citizenship", in Cassese, Clapham and Weiler (eds.), *Human Rights and the European Community: Methods of Protection (Part II)* (Baden-Baden, Nomos Verlagsgesellschaft, 1991), 309 and discussed in O'Leary *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), 39-40.

294 The citizenship rights at stake in the cases referred to above are invariably two of the most fundamental rights (arguably *the* most fundamental rights) of Union citizens, namely the right to free movement and the right to equal treatment.

295 See, in this sense Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 26 (where the AG remarks that "otherwise the competence of the Union to determine the rights and duties of its citizens would be affected").

296 See *supra*, n. 32 and n. 45, respectively.

297 See the discussion in O'Leary *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), 59-62.

298 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 40.

competence.[299] Now that it has been determined that Union law is applicable even in matters concerning Member State nationality, it must be determined precisely what rules or principles of Union law can serve as a limitation to the Member States' competence in this connection. However, it must immediately be remarked that such limitations will only apply in situations falling within the scope of Union law. There has to be, in other words, a link with Union law in order for these limitations to be applicable. Before discussing possible Union limitations, I will, therefore, first discuss the link required with Union law.

2. Link with Union law?

a) Generally speaking: two points of view

If the obligation to have due regard to Union law only applies in situations falling within the scope of Union law, the crucial question becomes: when do rules or decisions relating to Member State nationality come within the scope of Union law? This begs the question what link with Union law is required in order for nationality to come under scrutiny of Union law. As far as the area of free movement of persons and Union citizenship is concerned, two main points of view exist, a traditional one, requiring a "cross border" element and a more radical one, requiring a more abstract link with the Union legal order. These views express different opinions on the issue of the so-called "purely internal situation" – also referred to as the "purely internal rule" or "wholly internal rule"[300] –, a long-standing controversial issue that has provoked a vigorous debate among European scholars.[301] As I will set out below, these two views can be fruitfully employed in the field of nationality law.

In the first place, there is the view that only situations having an "inter-State" element or a "cross-border" dimension fall within the scope of Union law. This requires that a link can be proven between the situation of the person concerned and two or more specific Member States. Traditionally, the most common technique used by the ECJ to bring situations within the scope of Union law was a line of reasoning based on a combination of Articles 18 and 21

---

299 It can be so labelled only in the sense that the Union is at present most likely not competent to regulate nationality (see also the discussion under VI., *infra*). It is in this sense that AG Poiares Maduro's characterisation of the competence regarding nationality as an exclusive Member State competence must be understood (Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 17 and 23, *in fine)*. For reasons stated higher I consider it preferable to avoid using the label "exclusive Member State competence" altogether and I will refrain from doing so in the rest of this chapter.

300 Poiares Maduro has rightly remarked that the notion of purely internal situation varies depending on the area of Union law invoked and the degree of legal integration in that area. Accordingly, certain rules of Union law can be applied in situations which for the purpose of the application of other rules of Union law would be considered as outside the scope of Union law (Poiares Maduro, "The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations", in Kilpatrick, Novitz and Skidmore (eds.), *The Future of Remedies in Europe* (Oxford and Portland, Hart Publishing, 2000), at 120-023). See also Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 136. Taking this observation into account, I will limit my discussion to the area of free movement of persons and Union citizenship, which are relevant for my analysis.

301 See, among the first contributions on the issue, Druesne, "Discriminations à rebours. Peuvent elles tenir en echec la liberte de circulation des personnes?" (1979) R.T.D.E., 429-439 and Kon, "Aspects of reverse discrimination in Community law" (1981) *E.L. Rev.*, 75-101. For a detailed discussion and numerous references, see Tryfonidou *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International, 2009), 271 pp.

TFEU which is built around three elements.[302] First, Article 18 TFEU confers on every Union citizen the right to equal treatment within the scope of the Treaties. Second, the situations which fall within the scope of the Treaties include those involving the exercise of the freedom, conferred by Article 21 TFEU, to move and reside within the territory of the Member States. Consequently, Union citizens who reside in another Member State can claim the right to equal treatment in matters which the Union has no competence to regulate. More recently, the ECJ has brought situations within the scope of Union law on the sole basis of Article 21 TFEU. Where Union citizens were treated less favourably by their own Member State on the ground that they (or a (former) family member)[303] had exercised their right to free movement, such was held – in the absence of a compelling justification – to be an infringement of Article 21 TFEU. Again, this allows Union citizens who reside in a Member State other than the one of which they are a national (even if they have never resided in the latter[304]) to claim rights in areas which are not directly regulated by Union law. The right of residence in another Member State must, moreover, not derive from Article 21 TFEU, but can also derive from other rules of Union law[305] or even from national legislation in the Member State concerned.[306]

A second, broader point of view, considers as a sufficient link with Union law a more abstract link with the Union *legal order*. Accordingly, there is no need for a "cross border dimension" in the sense of a demonstrable link with two or more specific Member States. According to this point of view, the situation of a Union citizen can be considered to fall within the scope of Union law even in the absence of any element of free movement or the nationality of another Member State. Different theories have been put forward to sustain this point, all of them centred on the provisions concerning Union citizenship. First, it has been argued that the right to free movement and residence should be considered to cover also residence within one's own Member State, irrespective of any movement between Member States. This point of view has notably been advocated by AG Sharpston.[307] Another possibility is to consider the exercise of *any* of the rights associated with Union citizenship, even in one's own Member State, as a sufficient link with Union law.[308] For instance, a Union citizen who has taken part in a citizen's initiative, petitioned the European Parliament, applied to the Ombudsman or written to any of the institutions or bodies of the Union[309] could be said to have brought his situation within the scope of Union law, even if no link with a specific other Member State, such as a period of residence abroad, is present. The same is, arguably, true for a citizen who

---

302 See the discussion in Van Nuffel and Cambien, "Schoolgeld, Studiebeurzen, Sociale bijstand: de groeiende betekenis van Europees Recht in niet-economische domeinen", in Lenaerts and Wouters (eds.), *Internationaal en Europees recht (Themis School voor postacademische juridische vorming)* (Bruges, Die Keure, 2008), 77-98 and Tryfonidou *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International, 2009), 144-153.

303 See ECJ, Case C-403/03 *Schempp* [2005] E.C.R. I-6421, paras 22-25.

304 See ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 19.

305 For example as an (EU) family member of a Union citizen under Directive 2004/38.

306 See ECJ, Case C-456/02 *Trojani* [2004] E.C.R. I-7573.

307 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 100, 101 and 122 in particular; Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 144 in particular. The AG hereby invited the ECJ to reconsider its stance on purely internal situations, but at the same time suggested that the Court reopen the oral procedure and invite Member States to make their views on the issue known (see para. 157). The Court, however did not take up the AG's suggestion in its judgment. See the discussion by Van der Steen, "Zuiver interne situaties: geen omwenteling, wel inperking" (2008) *N.T.E.R.,* 301, at 303-304.

308 See the analysis in O'Leary *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), 278 *et seq.*

309 In accordance with Article 24 TFEU.

has participated in European Parliamentary elections.[310] Put differently, this second theory does not privilege the exercise of the right to free movement as a desired link with Union law, like the first view does. Rather, the exercise of any of the rights attached to Union citizenship is considered sufficient to bring a situation under Union law.[311] Lastly, it has been argued that Union citizens could derive a sufficient link with the Union legal order from Article 20 TFEU, which confers on nationals of the Member States a fundamental status with Union-wide rights attached to it. This argument has been mostly presented in connection with the principle of equal treatment.[312] More specifically, the view has been defended that Union citizens in "purely internal" situations should be able to invoke the principle of equal treatment, since "reverse discrimination"[313] is no longer defensible in a Citizens' Europe.[314] In other words, it is argued that Union law does not tolerate the unequal treatment of Union citizens depending on whether they can demonstrate a cross-border element.

Adopting the second point of view just set out in its purest form would come down, more or less, to *de facto* abolishing the "wholly internal rule" for Union citizens and their family

---

310 However, Article 22(2) TFEU grants this right only to "every citizen of the Union residing in a Member State of which he is not a national". Naturally, therefore, it applies only to citizens who have already exercised their right to free movement (see Opinion of AG Tizzano in Joined Cases C-145/04 and C-300/04 *Spain v United Kingdom; Eman and Sevinger* [2006] E.C.R. I-7917, para. 143). Those citizens are in any event covered, even under the first point of view. Yet, it could be argued that Union citizens who participate in European Parliamentary elections without moving to another Member State have also exercised a right connected with Union citizenship (in this sense Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 *CML Rev.*, 18). In the *Eman and Sevinger* case, which concerned the denial to certain groups of Dutch nationals from the right to vote in European Parliamentary elections, the Court applied the principle of equal treatment without explicating why Union law was applicable in the case (ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055). Arguably, that link consisted in the fact that the case concerned the organization of *European* Parliamentary elections (see Claes, "Zaak C-300/04, M.G. Eman en O.B. Sevinger t. College van burgemeester en wethouders van Den Haag en Zaak C-145/04 Koninkrijk Spanje t. Verenigd Koninkrijk van Groot-Brittanië en Noord-Ierland" (2007) *SEW,* 216). Clearly, that link did not consist in the fact that the applicants in the case had exercised their right to vote, since they had been precluded from doing so.

311 This possible approach is described by Jessurun d'Oliveira: Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 407-408. The author uses this arrgument to show the inconsistency in the current approach of the ECJ - which leans towards the first point of view set out above, requiring a "cross-border-element" - and to argue for the inapplicability of Union law to the nationality legislation of the Member States.

312 See, for instance, Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 *CML Rev.*,13, at 30 *et seq.* in particluar; Spaventa, "From Gebhard to Carpenter: Towards a (non-)economic European Constitution" (2004) 41 *CML Rev.*, 743, at 771. See also Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, 731, at 762 *et seq.* in particular.

313 Reverse discrimination is an issue because Member States are, in situations falling outside the scope of Union law, not obliged to extend the rights and privileges deriving from Union law to their own nationals. Consequently, these nationals are treated less favourably than other Union citizens. They cannot rely on the Union law principle of equal treatment because that principle is simply not applicable. Reverse discrimination is no longer an issue, however, if the status of Union citizen in itself suffices to consider a person as falling within the scope of Union law, because Member State nationals would no longer ever be in a situation outside the scope of Union law, in which they could be treated less favourably. For a very detailed analysis of reverse discrimination, see Tryfonidou *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International, 2009), 271 pp.

314 Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe" (2008) 35 *LIEI*, 43-67.

members[315] since they would almost automatically fall within the scope of Union law. Such would have considerable advantages (such as curing "reverse discrimination) and considerable drawbacks (such as possibly upsetting the division of competence between the Union and its Member States).[316] While the ECJ traditionally consistently held that Union law is not applicable to purely internal situations and that the provisions on Union citizenship as such do not provide a sufficient link with Union law,[317] it appears in a number of recent cases to have considered that the provisions on Union citizenship could provide a sufficient link with Union law. It has done so, notably, in a nationality related dispute (*Rottmann*) and in a dispute relating to family reunification (*Ruiz Zambrano*). In Chapter 4, I will discuss the judgment in *Ruiz Zambrano*[318] - and the follow-up judgment in *McCarthy*[319] - in some detail and consider the likely and desirable evolution of the wholly internal rule, in particular in the field of family reunification. In this chapter I will limit myself to the field of nationality law. Specifically with regard to nationality matters, I will argue that there is much to be said for taking the second point of view.

b) Nationality law as a "cas spécial"

i) Wide interpretation of the link with Union law

The two points of view regarding the link required for a situation to fall within the scope of Union law can usefully be applied to disputes concerning the nationality rules of one or more Member States. Under the first view set out above, a link with at least two specified Member States – even a most tenuous one – must be demonstrated for a situation to come within the scope of Union law. Applied to the field of nationality law, this means basically that nationality rules or decisions concerning nationality applied to Union citizens who exercise or have exercised their right to free movement by residing in another Member State than their Member State of nationality come under the scrutiny of Union law.

This line of reasoning was explicitly adopted in *Rottmann* by AG Poiares Maduro (but not followed by the Court in its judgment in the case). The AG considered that Mr. Rottmann had exercised his right to free movement by moving from Austria to Germany and that this exercise, indirectly, gave rise to his eventual status which was contested before the national court.[320] Yet, at the same time, the AG acknowledged that the link between the withdrawal of

---

315 See Tryfonidou *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International, 2009), at 166-171.

316 Dautricourt and Thomas, for instance, argue that the suppression of reverse discrimination (as well as the very concept of purely internal situations) generally speaking by relying on the provisions on citizenship of the Union would be "a premature step *at the present state of development of [Union] law"* (Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?" (2009) 34 *E.L. Rev.*, 454).

317 See para. 23 of ECJ, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171: "In that regard, it must be noted that citizenship of the Union […] is not intended to extend the scope *ratione materiae* of the [Treaties] also to internal situations which have no link with [Union] law […] Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State." This paragraph has consistently been referred to by the Court in later case law and is invariably discussed in the literature on reverse discrimination.

318 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr.

319 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr.

320 Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 11-13.

naturalisation at issue and the Union fundamental freedom was less direct than in most other cases.[321] The disadvantage suffered by Mr. Rottmann, namely the loss of his nationality, was caused by the fact that he committed fraud rather than by the fact that he had exercised his right to free movement. All the same, in my view, the AG was probably right to see an element of "movement" in the situation of Mr. Rottmann that could provide a sufficient link with Union law. After all, it was undisputed that Mr. Rottmann had exercised his right to free movement as an Union citizen by moving from Austria to Germany and that this movement had made it possible for him to start the naturalisation procedure which eventually gave rise to the disputed decision. The fact that the loss of German nationality was only a remote consequence of the exercise of the right to free movement cannot change this finding. As the AG somewhat hesitantly acknowledged himself, such a direct causal relationship between free movement and the disputed rule is not always required by the Court in order for that rule to be considered to fall within the scope of Union law. Neither did it matter that the withdrawal decision was taken by the German authorities vis-à-vis a (at that moment) German national,[322] because it is well established that Union law can be invoked by nationals who have exercised their free movement rights even against their own Member State.[323]

AG Poiares Maduro's hesitance with regard to finding a sufficient link with Union law can in fact be traced back to an evolution in the case law of the ECJ, which is analysed by Tryfonidou.[324] Traditionally, a national measure was considered to fall within the scope of Union law *because* it hindered the exercise of free movement rights, for instance because it discriminated nationals from other Member States and thereby made it less attractive for them to leave their Member State. In more recent case law, the Court of Justice appears willing to treat the scope of Union law and possible violations of the rights of Union citizens separately. It will examine, first, whether the applicant falls within the scope of Union law by reason of a cross-border element, and consider, next, whether the contested national rules infringe Union law, most commonly because they are discriminatory or because they are an obstacle to the exercise of free movement rights.[325] Consequently, considering the new approach of the

---

321 Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 13.

322 Oosterom-Staples (Oosterom-Staples, "Het internationale recht als beschermengel van de exclusieve bevoegdheden van lidstaten inzake verlies van nationaliteit?" (2010) *N.T.E.R.*, 188, at 192) draws an interesting parallel with ECJ, Case C-419/92 *Scholz* [1994] E.C.R. I-505, in which the ECJ considered that the situation of a former German national who had moved to Italy and had acquired the Italian nationality fell within the scope of Union law and that she could, therefore, challenge the decision of Italian authorities taken vis-à-vis her. The Court considered that "Any [Union] national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of the [relevant Treaty] provisions".

323 See, in this connection, for instance, ECJ, Case C-224/98 *D'Hoop* [2002] E.C.R. I-6191, paras 34-35; ECJ, Case C-224/02 *Pusa* [2004] E.C.R. I-5763, para. 20; ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 41. Of course, these cases concerned claims by nationals against their Member State who had exercised their right to free movement *as* nationals of that State. Mr. Rottmann, by contrast, had exercised his free movement rights when he was still an Austrian national. I do not think this would question the applicability of the case law just mentioned, since all that is required is that the exercise of the right to free movement provides a link with two or more identifiable Member States.

324 Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe" (2008) 35 *LIEI*, at 50-53 in particular.

325 Tryfonidou (at p. 50-51) sees cases as *Carpenter* and *Jia* (to which I would add the *Metock and Others* case) as illustrations of the fact that "there is no longer a need for a link to be established between a deterrent effect on the exercise of the fundamental freedoms and the national measure that is contested". However, the Court itself still qualified the national measures contested as obstacles to the exercise of fundamental freedoms. Admittedly, the Court may be said to have taken a lenient approach in these cases when accepting the existence of an obstacle to the fundamental freedoms. However, as far as the Court's

Court, the movement centred reasoning of AG Poiares Maduro holds good, despite the lack of any direct link between the movement and the withdrawal decision. From a systemic point of view, it would have been better, however, if the AG had not discussed possible obstacles to free movement at all when discussing the admissibility of the case, but only dealt with that issue when discussing possible violations of Union law.

It is my conviction that, in matters concerning nationality law, it is certainly preferable to follow the Court's recent approach to cross-border situations and make a categorical distinction between the scope of Union law and the possible violations of Union law. The fact that an applicant has moved to another Member State should be sufficient to consider his situation as falling within the scope of Union law, even if the national measure that is disputed does not directly impact on the exercise of his or her free movement rights. Of course, the right to free movement can, in addition, serve, as a limitation to the Member States' competence regarding nationality in the sense that nationality rules that unjustifiably hinder the exercise of free movement rights should be invalidated under Union law.[326] Still, free movement is not the only principle of Union law that functions as a limitation to the Member States' competence in the field. Whether there is an obstacle to the exercise of free movement rights should only be examined, therefore, when free movement is analysed as a possible ground for invalidating national rules or measures, not in order to determine whether they fall within the scope of Union law. However, if the rationale for holding a national measure to fall within the scope of Union law is no longer necessarily that it forms an obstacle to movement, it is far more straightforward still to embrace the second point of view set out above, as I will explain in the following.

The second point of view set out above holds that a "cross-border" dimension or an element of "movement" is not required. A more abstract link with the Union legal order, through the status of Union citizenship, suffices to consider a person as falling within the scope of Union law. Specifically in the field of nationality law, I would present this view as follows. Since any conferral of nationality by a Member State entails the acquisition of Union citizenship and the rights associated with it[327] – which can be exercised throughout the Union –, it will automatically present an (abstract) link with the Union legal order. Accordingly, national rules on acquisition of nationality should be held to fall within the scope of Union law. The same is true for national rules concerning loss of Member State nationality because loss of nationality entails loss of Union citizenship and the rights attached to it.[328]

The Court in *Rottmann* seems to have implicitly endorsed this approach in relation to rules on loss of nationality, where it stated that, in the circumstances of the case the situation of the applicant fell "by reason of its *nature* and its *consequences*, within the ambit of European

---

reasoning on the scope of Union law is concerned, these cases are no different from most other citizenship cases in that the exercise of a fundamental freedom was considered sufficient to bring a situation within the scope of Union law. On this very issue, I would not consider these cases as signalling a revolution, but rather as one among many illustrations of the Courts more flexible approach, separating scope of Union law and possible violations of Union law. I refer to the detailed discussion in Chapter 4, *supra*.

326 See the discussion under V.C.A., *infra*.

327 Leaving aside, for the purposes of this discussion, those instances where a person acquiring the nationality of a Member State already possessed the nationality of another Member State.

328 Leaving aside, for the purposes of this discussion, those instances where the person losing the nationality of a Member State preserves or at the same time acquires the nationality of another Member State.

Union law".[329] By this the Court most likely wanted to indicate two elements which, considered together, provided a sufficient link with Union law. First, a decision to withdraw Member State nationality is linked to Union law because it, by its very nature, entails loss of Union citizenship. Second, the consequences of such a decision for the person concerned are the loss of the rights attached to Union citizenship. He or she will no longer be entitled to exercise these rights throughout the Union. These consequences present a clear link with Union law. The Court's judgment on this point is groundbreaking, because it does not look for a "cross-border" dimension, even though such would not have been problematic, as is clear from AG Poiares Mauro's opinion. Rather, the Court saw Member State nationality and the possible loss thereof, given the inextricable links with Union citizenship, as a sufficient link in itself to consider a withdrawal of nationality to fall within the scope of Union law.

In my view, this is the approach to be followed in cases concerning nationality. Admittedly, *Rottmann* has a rather atypical fact set. On this ground it could be argued that the reasoning followed in *Rottmann* reasoning could not apply more broadly and be extrapolated to other cases in which a nationality decision threatened to deprive a Union citizen of his Union citizenship and the rights attached to it. The fact should not be overlooked that in *Rottmann* the Court was confronted with a situation in which, due to the lack of coordination between the nationality laws of two Member States, a person risked becoming stateless and losing his Union citizenship for having committed an offence which was in many ways not extraordinary. It could be suggested that the Court was principally concerned with avoiding these negative consequences from happening all too readily,[330] and that the Court's reasoning should not, therefore, be extrapolated to cases with a different set of circumstances.[331] It could, indeed, be questioned whether the fact that the nationality legislation of two specific Member States was at stake and the fact that there was an element of movement induced the Court to find that Union law was applicable.[332] If this was the case, decisions regarding nationality taken by a Member State vis-à-vis a national who has never moved to another Member State and never had the nationality of another Member State would still fall outside the scope of Union law. This would also apply where a Member States withdrew the naturalisation of a (former) third country national who had never exercised his right to free movement as a Union citizen.[333]

---

329 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 42 (italics added). AG Poiares Maduro in *Rottmann* explicitly rejected such approach as being too far-reaching (see Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 10).

330 Although the Court has been fiercely criticised for not going far enough in this regard: Kochenov, "Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters" (2010), *available at* http://ssrn.com/abstract=1593220; Kochenov, "Case C-135/08 *Janko Rottmann* v. *Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported" (2010) 47 *CML Rev.*, 1842-1845.

331 As has been observed by Davies (Davies, "The Entirely Conventional Supremacy of Union Citizenship and Rights" (2010) *EUDO Citizenship Forum, available at* http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2). Davies takes the view, however, that neither the judgment nor common sense provide much support for this narrow view (*Ibid.*). I share his view, as will become clear from the discussion below.

332 This seems to be confirmed by a literal reading of paragraph 42 of the *Rottmann* case, more in particular the phrase "after he has lost the nationality of another Member State that he originally possessed". See the discussion in De Groot, "Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europees Hof van Justitie" (2010) *Asiel & Migratierecht*, 295-296. As I will explain below, I argue against such a literal and narrow reading.

333 De Groot states that, precisely with regard to such circumstances, the consequences of the *Rottmann* decision are far from clear. At the same time, he submits that it would be unfortunate to make a distinction based on whether an element of movement is present (De Groot, "Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europees

I am convinced that the reasoning adopted by the Court in *Rottmann* should not be limited to the facts of that case and can be applied more generally. Consequently, all cases of loss of Member State nationality can henceforth be considered to fall within the scope of Union law to the extent that they entail, for the person concerned, the loss of Union citizenship.[334] Member State nationality in itself, given its inextricable link with Union citizenship, can be considered to provide a sufficient link with Union law, even in cases which were traditionally considered to be "purely internal". It is clear, for instance, that a Union citizen who loses the nationality of a Member State without at the same time preserving or acquiring the nationality of another Member State, loses the very same fundamental status and the very same rights under Union law regardless of whether she has exercised her right to free movement. It is not defensible, therefore, to make a distinction in this regard between Union citizens who have moved or those who have not or, as Gerard-René De Groot has put it, between "average" Member State nationals and Member State nationals "carrying little Union stars around their head".[335]

ii) Acquisition and loss of Member State nationality

Another important question left unanswered by the *Rottmann* case is whether, even if we accept that the Court's reasoning can be applied more generally, it should be confined to cases of loss of nationality, with which the Court was concerned in *Rottmann*, or should be held equally applicable in cases of acquisition of nationality (or the refusal thereof).[336] I see no reason for making a distinction between cases of acquisition and rules on loss of nationality. Such a distinction is not defensible, because the acquisition of Member State nationality has the same strong link with the Union legal order as the loss of a Member State nationality, at least where it entails Union citizenship.[337] By its very nature the acquisition of Member State nationality confers upon an individual the most fundamental status of nationals of the Member States and this automatically has Union wide consequences, in the sense that the person concerned will be entitled to exercise certain rights in all Member States.

Hof van Justitie" (2010) *Asiel & Migratierecht*, 296). See also the observations by Oosterom-Staples concerning the possible consequences of a withdrawal of naturalisation vis-à-vis third country nationals (Oosterom-Staples, "Het internationale recht als beschermengel van de exclusieve bevoegdheden van lidstaten inzake verlies van nationaliteit?" (2010) *N.T.E.R.*, at 193).

334 Confirmation of this view is provided by the recent *Ruiz Zambrano* case, in which the Court held that the situation of a Union citizen fell within the scope of Union law, even though a cross-border dimension was lacking. In support of this finding, the Court explicitly referred to paragraph 42 of the *Rottmann* judgment (see ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 42). The *Ruiz Zambrano* judgment illustrates that the reasoning in *Rottmann* can find application more broadly even in disputes concerning other rules than nationality rules (*Ruiz Zambrano* concerned rules regarding family reunification).

335 Gerard-René De Groot, *Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europees Hof van Justitie*, ASIEL & MIGRATIERECHT, 296 (2010).

336 See the discussion in Davies, "The Entirely Conventional Supremacy of Union Citizenship and Rights" (2010) *EUDO Citizenship Forum, available at* http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2 and my case note in (2010) *SEW*, 380.

337 Higher, I argued that the loss of Member State nationality will not automatically fall within the scope of Union law where it does not entail the loss of Union citizenship, because the individual concerned at the same time acquires or maintains the citizenship of another Member State. *Mutatis mutandis*, the acquisition of nationality will not automatically fall within the scope of Union law where it does not entail the acquisition of Union citizenship, namely where the person concerned already had the nationality of a Member State.

It must be immediately pointed out that the competence of the Member States to lay down criteria for the acquisition of nationality necessarily implies the competence to deny nationality to persons who do not fulfil these criteria. In other words the competence regarding acquisition of nationality embodies both the competence to *confer* nationality and to *refuse* to confer nationality. The question that arises is whether a refusal of nationality can be said to fall within the scope of Union law, through its links with Union citizenship, in a way similar to what was concluded above with regard to conferral (and withdrawal) of Member State nationality. The problem here is that an individual who is refused the nationality of a Member State and who does not have nor ever had the nationality of a Member State[338] – has never acquired Union citizenship. He or she has never, through his or her very status, entered the "realm of Union law". It is certainly more difficult to argue, therefore, that his or her situation exemplifies the same strong links with Union law as that of an individual who has acquired or lost the status of Union citizen. Nevertheless, it is possible to argue that refusal of Member State nationality has similar consequences under Union law as loss of nationality and should therefore be treated similarly from the viewpoint of Union law. Indeed, where an individual (or groups of individuals) is denied the nationality of a Member State, this has for a consequence that he (or they) will not be able to enjoy the rights associated with Union citizenship. These are the very same rights that a Member State national would lose if his or her (only) Member State nationality were to be withdrawn. It might be objected that the loss of rights which one previously had will normally have stronger consequences for an individual than the denial of rights which he or she never had. This somehow limits the parallelism, but it does not make it meaningless, in particular since the consequences for the Member States are the same, namely the absence of the possibility for the individual concerned to exercise his rights in these States.

There is some support for this view in the case law of the ECJ. Already in *Micheletti*, the Court held that it is for each Member State, having due regard to [Union] law, to lay down the conditions for the *acquisition and loss* of nationality.[339] In *Rottmann*, the ECJ clarified that this case law means that the exercise of that power, in so far as it affects the rights of Union citizens, is amenable to judicial review, adding that this "is *in particular* the case of a decision withdrawing naturalisation such as that at issue in the main proceedings".[340] Moreover, in *Rottmann* the ECJ explained that "the principles stemming from this judgment with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalisation *and to the Member State of the original nationality.*[341] Accordingly, should Austria eventually refuse Mr. Rottmann the reacquisition of his (initial) Austrian nationality, the Court would seem prepared to scrutinise this decision on its compliance with Union law. All this seems to support the view that not only the loss of Member State nationality falls within the scope of Union law.[342]

---

338 As is the case with conferral or loss of Member State nationality, refusal of Member State nationality will, in any event, not automatically fall within the scope of Union law where it does not affect the status of Union citizenship of the person concerned, for example because that person already had the nationality of a Member State.

339 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 10 (italics added).

340 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 48 (italics added). The expression "in particular" seems to imply that other types of decisions regarding nationality are also amenable to judicial review.

341 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 62 (italics added).

342 See Kochenov, "Case C-135/08 *Janko Rottmann* v. *Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported" (2010) 47 *CML Rev.*, 1836.

On the other hand, *Kaur*[343] seems to support the opposite view, namely that only the deprivation of Union citizenship falls within the scope of Union law, not the denial thereof. The applicant in that case was a British Overseas citizen and therefore, in accordance with the declaration of the United Kingdom, not a national "for the purposes of Union law". She argued that the UK rules on nationality infringed Union law because they denied certain categories of British citizens the benefits associated with Union citizenship. The Court considered that there was no question of any deprivation of rights under Union law since those rights had never arisen in the first place.[344] The Court explicitly distinguished *Rottmann* from *Kaur*, pointing at the fact that Mr. Rottmann had unquestionably been a Union citizen.[345] Does this mean that the ECJ considers that denial of (full-blown) Member State nationality falls outside the scope of Union law? I am strongly convinced that this question must be answered in the negative. As just explained, other ECJ cases, including the *Rottmann* case, lend support for the view that cases of acquisition of nationality can fall within the scope of Union law and this is justified because cases of loss and acquisition of nationality have the same strong links with Union law. The *Kaur* decision, which dealt with the specific issue of citizens of former colonies and the validity of the declaration of a Member State made when signing the Treaty, should probably best be confined to its specific facts. In any event, in my view, the Court would be mistaken if it treated cases of (refusal of) acquisition differently from cases concerning loss of nationality, for reasons explained higher.

It can be concluded that it probably follows from the *Rottmann* judgment that the Member States' competence regarding both acquisition and loss of nationality falls within the scope of Union law to the extent that it has an impact on the status of Union citizenship. Agreeing with Davies, I find a distinction between rules on acquisition of nationality and rules on loss of nationality highly illogical and inequitable.[346] Moreover, once it is agreed that the Member States rules on acquisition of nationality come under the scrutiny of Union law, it would be illogical to distinguish between conferral and refusal of nationality, since the very same rules will embody the criteria that determine both of them. Accordingly, I conclude that it should be possible to challenge cases of conferral, loss and, with some hesitance,[347] refusal of Member State nationality before the Union courts if they have an impact on the Union citizenship status of the persons concerned and this should be the case, irrespective of whether the situation of the person concerned presents a link with two or more specific Member States.[348]

---

343 ECJ, Case C-192/99 *Kaur* [2001] E.C.R. I-1237. For more particulars, see the case note by Toner in (2002) *CML Rev.*, 881-893.

344 ECJ, Case C-192/99 *Kaur* [2001] E.C.R. I-1237, para. 25.

345 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 49.

346 Davies, "The Entirely Conventional Supremacy of Union Citizenship and Rights" (2010) *EUDO Citizenship Forum, available at* http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2.

347 Given that is will be more difficult in these cases to establish a sufficient link with Union law, as I have explained higher. The Union Courts will therefore probably be more hesitant when confronted with cases of refusal of Member State nationality.

348 A link with two specific Member States will presumably be least easy to demonstrate in cases where the (refusal or) acquisition of Member State nationality is disputed, since third country nationals will presumably find it more difficult to establish a link with two or more identifiable Member States than Member State nationals. Nevertheless, the situation of third country nationals may present a clear "cross-border" or "free movement" element. See for instance, the Court's judgment in *Metock and Others* (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241) and Cambien, "Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform" (2009) 15 *Colum. J. Eur. L.*, 321-341.

iii) Consequences

Does all this mean that I propose to abolish the wholly internal rule? Do I propose to do so as far as Union citizens and their family members are concerned? The answer is no. I do not suggest that the Court's settled case law requiring a cross-border dimension should be reversed. The consequences of such major reversal, in particular as regards the division of competences between the Union and its Member States would be most significant and the justifications for such a revolution in the case law cannot be appropriately analysed in the framework of this chapter.[349] Consequently, I will refrain from drawing any conclusions as to the desirability of such change. What I do propose, however, is – on a more limited scale – that in disputes concerning the nationality rules of one or more Member States, the acquisition, refusal, denial or loss of nationality should be considered as a sufficient link with Union law for such situations to be held to fall within the scope of Union law. In my view, such does not come down to abolishing the wholly internal rule in such cases. Rather I consider that Union citizenship and its growing significance in the case law of the ECJ and in the Union legal order in general prompt us to hold that such cases are no longer outside the reach of Union law. Hence, such cases should no longer be considered as wholly internal to a Member State. This should only be different if a second Member State nationality is at stake and, as a consequence thereof, the status of Union citizenship of the person is not affected. For instance, loss of Member State nationality does not lead to loss of Union citizenship where the person concerned possesses or at the same time acquires the nationality of another Member State. Such cases of loss of nationality will not normally fall within the scope of Union law. Similarly, the acquisition or denial of Member State nationality will, in the case of persons already possessing the nationality of another Member State, not fall within the scope of Union law.

This limited revolution in the case law of the ECJ would leave the Court's stance on the wholly internal rule in other fields intact. For instance, a Member State national who could not demonstrate any inter-state link would still not be able to invoke the (possibly more generous) rules on family reunification laid down in Directive 2004/38.[350] Accordingly, in these cases "movement" keeps its relevance. Besides, even in cases of nationality disputes, free movement would remain relevant as a possible limitation to the competence of the Member States.[351] The justification for treating nationality rules different from other national rules as far as the scope of Union law is concerned, rests, as will be clear from the foregoing, on two grounds. First of all, nationality rules are by their very nature different from all other national rules in that they regulate, through Article 20(1) TFEU, the possession of a *status* which, in turn, gives entitlement to rights. Accordingly they govern the "gateway" to a bundle of rights, rather than the exercise of a specific right, as other national rules will typically do. The status in question is, moreover, the fundamental status of nationals of the Member States, namely Union citizenship. Union citizenship is one of the key concepts of

---

349 See, however, the discussion in Chapter 4, *infra*, in which I analyse this issue in more detail with regard to the rights enjoyed by family members of Union citizens.

350 See, in this sense, ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 76-78. See also, however, ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr. In the circumstances of that case, the Court considered that a young Union citizen could claim the right to be joined by a non-EU family member, despite the fact that no inter-State link was present. As I explain in Chapter 4, I believe the Court's reasoning is probably limited to certain specific sets of cases. In other cases, the right to be joined by family members most probably still depends on the existence of an inter-State element. This is confirmed by the more recent *McCarthy* judgment (ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr.). See the detailed discussion in Chapter 4, *infra*, under III.

351 See V.C.A., *infra*.

Union law, on which the application of numerous rules of Union law is dependent.[352] On account of both aspects just described, nationality rules have a far more fundamental link with the Union legal order than other national rules. For this reason I would argue that nationality rules – in contradistinction to other national rules – could never be considered not to fall outside the scope of Union law, to the extent that they impact on the possession of Union citizenship. *Rottmann* may be seen as an indication that the Court is willing to go down this path and treat nationality rules differently from other national rules as far as the determination of the scope of Union law is concerned.

It appears, however, from the judgment in *Ruiz Zambrano*[353] that the Court is willing to consider Union citizenship as a sufficient link with Union law also in other contexts. In that case, the Court was confronted with the refusal by the Belgian authorities of a right of residence to the non-EU parent of Belgian nationals who had never moved to another Member State. The Court considered that this refusal was contrary to Union law because it would deprive the Union citizens in question of the genuine enjoyment of the substance of their citizenship rights. The Court cited its judgment in *Rottmann* in support of this holding. As I explain in Chapter 4, a fruitful parallel can be drawn between the *Ruiz Zambrano* case and the *Rottmann* case, because the disputed national decision in both cases threatened to make it impossible for the Union citizens concerned to exercise some of the most important Union citizenship rights. The bottom-line is probably that in certain circumstances a national measure refusing a right of residence to a family member of a Union citizen may be sufficiently similar in effect to a decision refusing or withdrawing a Member State nationality that the justifications for treating nationality rules as a "cas spécial" equally apply and, consequently, Union law will be applicable regardless of any inter-State element. I am of the view, however, that this parallel will be limited to national rules or measures which have the effect of *de iure* or *de facto* annihilating an individual's Union citizenship.[354]

Finally, it must be emphasised that interpreting Member State nationality as a sufficient linking factor does not take away the Member States' competence to regulate the acquisition and loss of nationality.[355] It only has for a consequence that Member States have to take Union law into account when exercising this competence, even when regulating situations which present no cross-border dimension. Such is perfectly compatible with the principled competence of the Member States in matters of nationality, as I have discussed above.

C. Possible Union law limitations

Under the previous heading I have explained that, where Union citizenship is at stake, the Member States' competence regarding acquisition and loss of nationality should be considered to fall within the scope of Union law. In this section, I will deal with possible Union law limitations to the Member States' competence as regards the adoption and implementation[356] of rules concerning nationality.[357] I do not in any way attempt to give an

352 This is not just the case for the specific provisions on Union citizenship. The four freedoms, for instance, can only be relied on by (economically active) Union citizens.

353 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr. See, similarly, ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr.

354 In refer to the detailed discussion in Chapter 4, *infra*.

355 See the discussion under V.B.1., *supra*.

356 I am not just concerned with general rules on nationality but also with individual decisions to (refuse to) grant nationality adopted on the basis of these rules. It is important to consider both, because Union law may well tolerate certain general rules on nationality, but not the way they are implemented in a particular

exhaustive overview of all possible such limitations. I will limit my discussion to five possible limitations: the guarantee of free movement rights, the duty to respect fundamental rights, the principle of proportionality, the principle of sincere cooperation and the principle of legitimate expectations. I will analyse in what situations these rules or principles can serve as a limitation to the competence of the Member States and to what extent they will likely do so. As will become clear from the discussion below, some of these limitations are particularly relevant with regard to the Member States' competence regarding *acquisition* of nationality (including refusal of nationality[358]), whereas others will be more relevant to rules on *loss* of nationality and, still others, to both of them. It can be expected that the consequences of these limitations will be different depending on whether we are concerned with an acquisition of nationality, a refusal of nationality or loss of nationality. These consequences will be discussed under the next heading (see *infra*, under "D").

Before I start my analysis, it is important to stress one point. To understand how Union law influences Member States in the field of nationality measures, it is important to clearly make one distinction from the outset, namely that between recognition of Member State nationality, on the one hand, and conferral of Member State nationality, on the other hand. With regard to the first concept, Union law mandates that Member States unconditionally recognise the nationality granted by another Member State. This duty can result in an indirect *de facto* influence, discussed under title III. With regard to the second one, I argue that Union law imposes certain direct limitations to the competence of the Member States. It is with these direct limitations that I am concerned here. Throughout the analysis it is important to bear in mind the stated distinction between conferral of Member State nationality and recognition of Member State nationality: Union law arguably imposes limitations with regard to the first one, but prohibits Member States from enacting or applying limitations with regard to the second one. As far as loss of Member State nationality the same distinction applies, since the duty of unconditional recognition flowing from *Micheletti* arguably also applies to cases of loss of nationality.[359] Accordingly, with regard to loss of nationality too it is important to stress that I am concerned with direct limitations deriving from Union law with regard to the Member States rules on loss of nationality, and not so much with the recognition of measures concerning loss of nationality by other Member States.

1. Guarantee of free movement rights

The first limitation that will be discussed is the right to free movement of persons within the territory of the Member States, as laid down in Article 21 TFEU and the Treaty provisions on the free movement of economic actors.[360] Admittedly, the rules on nationality remain within

---

case. This is perfectly illustrated (with regard to loss of nationality) by the *Rottmann* judgment: while the German rules on loss of nationality seemed to be perfectly in accordance with Union law, the individual withdrawal decision at hand could still possibly violate Union law, namely the principle of proportionality. I will hinge my analysis of the consequences of Union limitations to the competence of Member States on this distinction.

357 As explained above, this analysis starts from the dictum in *Micheletti*: "Under international law, it is for each Member State, *having due regard to [Union] law*, to lay down the conditions for the acquisition and loss of nationality (ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 10 (italics added).

358 As explained higher, the competence to lay down and implement rules on acquisition of nationality, by its very nature, entails the competence to *refuse* the acquisition of nationality.

359 See the discussion under IV.B., *supra*.

360 It is settled case law that the right set out in Article 21 TFEU finds specific expression in the provisions on the free movement of economic actors. See, *e.g.*, ECJ, Case C-193/94 *Skanavi* [1996] E.C.R. I-929, para.

the competence of the Member States, but, as I discussed higher, according to settled case law the Member States have to exercise their competences in accordance with the provisions on free movement of Union citizens.[361] It is settled case law that national legislation could violate these provisions not only by placing direct restrictions on the exercise of the right to free movement,[362] but also by attaching negative consequences to the exercise of this right.[363] The ECJ has held, for instance, that this was the case where the legislation of a Member State made the entitlement to certain benefits conditional on residence in the territory of that State,[364] because that legislation was liable to dissuade nationals of the Member State in question from exercising their freedom to move and to reside in another Member State. The bottom-line is that, under such legislation, nationals of a Member State are "punished" for exercising their free movement rights, because by doing so they would forego certain rights or benefits under national law. These laws therefore restrict the exercise of the right to free movement. Of course, such restrictions can, according to settled case law, still be justified if they are based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions.[365]

This duty to safeguard the free movement of persons should most definitely also apply in the field of nationality rules.[366] On similar grounds to the cases just referred to, one could well argue that Article 21 TFEU would be violated if a Member State's nationality law were to provide that nationals of that Member State would lose their nationality after having lived in

---

22 (on the freedom of establishment); ECJ, Case C-100/01 *Oteiza Olazabal* [2002] E.C.R. I-10981, para. 26 (on the free movement of workers); ECJ, Case C-208/05 *ITC* [2007] E.C.R. I-181, para. 64 (on the freedom to provide services). References to the free movement of persons in this context are therefore to be understood as references to free movement of both economically active persons and non-economically active persons. In some recent cases the ECJ interprets Article 21 TFEU in a very similar way as Articles 45, 49 and 56 TFEU; see *e.g.* ECJ, Case C-152/05 *Commission v Germany* [2008] E.C.R. I-39, paras 20-30. See also the Opinion of AG Ruiz-Jarabo Colomer in *Petersen*, in which the AG proposes to interpret Article 21 TFEU in a way different from the provisions on the economic freedoms (Opinion of AG Ruiz-Jarabo Colomer in Case C-228/07 *Petersen* [2008] E.C.R. I-6989, paras 13-39). I refer to the detailed discussion in Chapter 4, *infra*.

361 See, *e.g.*, ECJ, Case C-353/06 *Grunkin and Paul* [2008] E.C.R. I-7639, para. 16; ECJ, Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] E.C.R. I-6849, para. 99; ECJ, Case C-403/03 *Schempp* [2005] E.C.R. I-6421, para. 19; ECJ, Case C-385/00 *De Groot* [2002] E.C.R. I-11819, para. 75.

362 For a recent example, see *e.g.* ECJ, Case C-33/07 *Jipa* [2008] E.C.R. I-5157.

363 According to settled case law, Member State legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 21 TFEU (see *e.g.* ECJ, Case C-224/98 *D'Hoop* [2002] E.C.R. I-6191, para. 31; ECJ, Case C-224/02 *Pusa* [2004] E.C.R. I-5763, para. 19).

364 See, *e.g.*, ECJ, Case C-406/04 *De Cuyper* [2006] E.C.R. I-6947, para. 37; ECJ, Case C-192/05 *Tas-Hagen and Tas* [2006] E.C.R. I-10451, para. 32; ECJ, Case C-499/06 *Nerkowska* [2008] E.C.R. I-3993, para. 33.

365 See *e.g.* ECJ, Case C-406/04 *De Cuyper* [2006] E.C.R. I-6947, para. 40. See the more detailed discussion in Van Nuffel and Cambien, "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren" (2009) 57 *SEW*, 144-154.

366 As AG Poiares Maduro has rightly remarked, already the Court's holding in *Micheletti* that Member States are obliged to unconditionally recognize Member State nationality as conferred by another Member State "was based not only on the concern to protect the competence of a Member State to determine the status of national, but also on the concern to avoid any variation in the personal scope of the [Union] fundamental freedoms from one Member State to another depending on the rules laid down by them in regard to nationality" (see his Opinion in *Rottmann*, para. 32). I agree that the Court in *Micheletti* was concerned with safeguarding the free movement of persons. However, the free movement provisions did not so much function as a direct limitation to the nationality rules of the Member State concerned (Spain), but rather had an impact on his rules regarding recognition. Below I will analyse whether the free movement provisions can also serve as a direct limitation to the Member States' competence regarding nationality.

another Member State during a certain period of time.[367] Such a rule would have for a consequence that nationals of the Member State concerned who had exercised their right to free movement by residing in another Member State for a certain period of time, would lose the nationality of the first Member State, and hence the status of Union citizenship, at least where they would not possess or acquire the nationality of another Member State.[368] Yet Union citizenship is the very status that gives entitlement to the right to free movement under the Treaties in the first place. Hence, under rules as the one described, the exercise of free movement rights would not just be discouraged; exercising free movement rights would eventually become impossible. Moreover, the national in question would not only lose his entitlement to the right to free movement. He would at the same time lose entitlement to all other rights connected to the status of Union citizen, such as the right to equal treatment. If, as is clear from the case law discussed in the previous paragraph, it runs counter to Article 21 TFEU for a national rule to provide for a loss of certain rights or benefits under national law on the mere ground that the person in question has exercised his free movement rights, *a fortiori* it would run counter to Article 21 TFEU to provide for the loss of all rights attached to Union citizenship for the mere reason of having exercised one of these rights, namely the right to free movement.

The exercise of the rights attached to Union citizenship should not result in losing the very status which entitles a person to these rights. To further clarify this, I want to stress two points. First, it is important not to overestimate the scope of this argument. I am not arguing that Member States are no longer allowed to provide for the loss of Member State nationality vis-à-vis Union citizens who have exercised their right to free movement. I am also not arguing that Member States cannot take away nationality where such entails the loss of the right to free movement in view of the fact that such "would be consistent with the Court's tendency to maximise the number of beneficiaries of free movement".[369] What I suggest here is not that Member States are always precluded under Union law from withdrawing their nationality where this results in depriving the person concerned from its rights under Union law, but rather that this is the case where such withdrawal is triggered precisely because the person in question has decided to exercise his rights under Union law, and more precisely his right to free movement as a Union citizen. This view finds convincing grounds in the recent case law of the ECJ, as just explained. Second, it must be emphasised that the provisions on free movement provisions operate here as a limitation to the competence of the Member States and not as a linking factor providing a connection with Union law. As I have explained higher, Member State nationality can, under certain circumstances, in itself be considered as

---

367 De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 14 *et seq.*; De Groot, "The Relationship between the Nationality of the Member States of the European Union and European Citizenship", in La Torre (ed.), *European Citizenship: An Institutional Challenge* (The Hague, Kluwer Law International, 1998), 136-139; also discussed in Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights" (2009) 15 *Colum. J. Eur. L.*, 192 and Hailbronner, "Nationality in Public International Law and European Law", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses* (Amsterdam, Amsterdam University Press, 2006), 93. The argument was approvingly referred to by AG Poiares Maduro in his Opinion in the *Rottmann* case (Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449., para. 32).

368 Take the hypothetical example of a Member State A which would adopt the rule that residence in another country for a continuous period of 10 years would lead to loss of the nationality of Member State A. A person with the nationality of Member State A and of a third country could, as a consequence of this rule, after 10 years of residence in Member State B, be left with only the nationality of the third country concerned and thus have lost his Union citizenship.

369 Handoll *Free Movement of Persons in the EU* (Chichester, John Wiley & Sons, 1995), 67.

an element providing a sufficient connection with Union law. Accordingly, the free movement based argument could in principle be invoked even by a Union citizen who has never exercised his free movement rights. Indeed, the application of a nationality rule as described above would have as a consequence that, if that person decided to exercise his free movement to the Member State concerned, he would eventually possibly lose his Union citizenship. Such could discourage him from moving to the Member State concerned and on that basis the rule could be said to infringe Article 21 TFEU.[370]

Based on the foregoing reasoning, it is submitted that Union law precludes Member States from providing for the automatic loss of nationality on grounds of residence in another Member State for a certain period of time. Member States can accommodate this limitation imposed by Union law in at least three ways. First of all, a Member State's nationality law may provide for loss of nationality in case of lengthy residence abroad, if at the same time an exception is made for residence in another EU Member State. A good illustration is Article 15(1) of the Netherlands Nationality Act (*Rijkswet op het Nederlandschap*), which provides that "Netherlands nationality shall not be lost if the person involved is residing within the territory of the European Union".[371] The government added this phrase to an earlier proposal, specifically arguing that the text originally proposed might have violated the right of free movement within the EU.[372] Secondly, a Member State's legislation may provide that loss of nationality can be avoided by submitting a declaration. Such a rule would not violate Union law because Union law does not preclude Member States from requiring reasonable diligence from their citizens in the exercise of their rights.[373] De Groot cites Article 22 of the Belgian Nationality Act as an example.[374] That article provides that a Belgian national born abroad, with the exception of former Belgian colonies, loses his nationality if he has been principally and continuously resident abroad between the age of 18 and 20, except under certain circumstances. The article adds however that this will not be the case if the person concerned

---

370 In *Jipa* the ECJ held that "the right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin" (ECJ, Case C-33/07 *Jipa* [2008] E.C.R. I-5157, para. 18). See the discussion in Oosterom-Staples, "Het fundamentele recht op vrij verkeer nader bepaald: het arrest Jipa onder de loep" (2009) *N.T.E.R.*, 12-17.

371 The Dutch text of Article 15(1) reads: "Het Nederlanderschap gaat voor een meerderjarige verloren […] c. indien hij tevens een vreemde nationaliteit bezit en tijdens zijn meerderjarigheid gedurende een ononderbroken periode van tien jaar in het bezit van beide nationaliteiten zijn hoofdverblijf heeft buiten Nederland, de Nederlandse Antillen en Aruba, *en buiten de gebieden waarop het Verdrag betreffende de Europese Unie van toepassing is*, anders dan in een dienstverband met Nederland, de Nederlandse Antillen of Aruba dan wel met een internationaal orgaan waarin het Koninkrijk is vertegenwoordigd, of als echtgenoot van of als ongehuwde in een duurzame relatie samenlevend met een persoon in een zodanig dienstverband[…]" (italics added).

372 See the discussion in Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 408.

373 See *e.g.* ECJ, Joined Cases C-46/93 and C-48/93 *Factortame* [1996] E.C.R. I-1029, para. 84: "…in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him". See also ECJ, Case 37/74 *Van den Broeck* [1975] E.C.R. 235, in which the ECJ held that the applicant had not been discriminated against, because she could have avoided the alleged worse off position by making a declaration to renounce her (Belgian) nationality. A similar reasoning was followed in ECJ, Case 257/78 *Devred* [1979] E.C.R. 3767.

374 De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 17.

declares, before attaining the age of 18, his wish to keep his Belgian nationality.[375] A third alternative consists in providing for automatic loss of nationality in the case of lengthy residence abroad, but adding that residence in another Member State of the EU will not lead to loss of nationality if, at the relevant time, the person concerned does not posses the nationality of another Member State.[376] An example may clarify this. If, under a hypothetical Dutch nationality law, a person having both the Netherlands and the Belgian nationality were to lose his Netherlands nationality after having lived in Germany for 10 years, that rule would not infringe Union law if this person would at the same time keep his Belgian nationality, through a simple declaration for instance. Similarly, if a Netherlands national would acquire the German nationality by marrying a German wife, and would, under the same law, lose his Netherlands nationality after having lived in Germany for 10 years, that nationality law would not infringe Union law either. Indeed, what matters at the end of the day is that a person should not, in one way or another, lose his Union citizenship merely for the mere reason of having exercised his or her free movement rights.

2. Duty to respect fundamental rights

A second limitation to the competence of the Member States in nationality matters could be said to flow from the duty to respect fundamental rights.[377] Arguably, Union law would be violated where domestic rules on nationality violated fundamental rights.[378] Fundamental rights form part of the general principles of Union law[379] and have to be respected, therefore, by the Member States when acting within the scope of Union law.[380] It will be recalled that a conferral, refusal or withdrawal of Member State nationality should be considered as falling within the scope of Union law where it has an impact on the Union citizenship status of the person(s) concerned. Once we accept that Member States are acting within the scope of Union law when adopting measures regarding nationality, it follows that they will have to exercise this competence in accordance with Union law, and thus with fundamental rights. Yet, understandably, given the sensitivity of the Member States in this field and the large discretion pertaining to them, the Courts will likely be reluctant to hold that nationality rules

---

375 The French text of the article reads: "Perdent la qualité de Belge: […] 5. le Belge né à l'étranger a l'exception des anciennes colonies belges lorsque: a) il a eu sa résidence principale et continue à l'étranger de dix-huit à vingt-huit ans; b) il n'exerce à l'étranger aucune fonction conférée par le Gouvernement belge ou à l'intervention de celui-ci, ou n'y est pas occupé par une société ou une association de droit belge au personnel de laquelle il appartient; c) il n'a pas déclare, avant d'atteindre l'âge de vingt-huit ans, vouloir conserver sa nationalité belge […]".

376 A point also made in Staples, "Wie is burger van de Unie?" (2001) *N.T.E.R.*, 111.

377 This proposition can draw inspiration from general international law. Note in particular a celebrated opinion of the American Court of Human Rights (RE Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984)), in which the Court states: "despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also *circumscribed by their obligations to ensure the full protection of human rights*" (italics added).

378 See the Opinion of AG Poiares Maduro in *Rottmann*, para. 28.

379 *E.g.* ECJ, Case 29/69 *Stauder* [1969] E.C.R. 419, para. 7; ECJ, Case 11/70 *Internationale Handelsgesellschaft* [1970] E.C.R. 1125, par. 4. See also Article 6(3) TEU.

380 Article 51(1) of the Charter of Fundamental Rights of the European Union, [2010] O.J. C83/389. See further Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 821 *et seq.*

or measures of the Member States violate fundamental rights except in the most clear-cut cases.

The next step to determine then is what fundamental rights are crucial in this regard. As a general principle it must be pointed out that, in safeguarding fundamental rights, the ECJ will draw inspiration from the constitutional traditions of the Member States and from international treaties on fundamental rights.[381] International treaties for the protection of fundamental rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Union law.[382] In that regard, the ECHR has special significance.[383] As a consequence, the ECJ can have regard to Treaties by which not all Member States are necessarily bound.

The limitation to the Member States' competence regarding nationality deriving from the duty to respect fundamental rights will perhaps be most crucial with regard to withdrawal of nationality. As Hall[384] points out: "it will, from a fundamental rights perspective, ordinarily be a much more serious matter to be deprived of a nationality than to gain one". Yet it is also possible that rules on acquisition of nationality are couched in terms that violate fundamental rights such as the right to equal treatment. Hence, a refusal of nationality based on such criteria may equally violate fundamental rights.

a) Fundamental right to equal treatment

The principle of equal treatment is a general principle of Union law[385] which finds specific expressions in Articles 18 and 19 TFEU and the measures adopted under the latter.[386] It is embodied, moreover, in a number of important international legal instruments, which can serve as guidelines for the ECJ when assessing the compatibility of the Member States' (nationality) laws with this principle. An important guiding source will normally be Article 14 ECHR,[387] given the special place of the ECHR in the protection of fundamental rights within the Union.[388] Article 14 prohibits discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Another important source could be Article

---

381 Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 824.

382 ECJ, Case 4/73 *Nold* [1974] E.C.R. 491, para. 13.

383 See *e.g.* ECJ, Case 29/69 *Stauder* [1969] E.C.R. 419, para. 7; ECJ, Case C-274/99 P *Connolly* v *Commission* [2001] E.C.R. I-1611, para. 37; ECJ, Case C-283/05 *ASML* [2005] E.C.R. I-12041, para. 26; ECJ, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] E.C.R. I-5305, para. 29; ECJ, Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] E.C.R. I-6351, para. 283.

384 Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 99.

385 See *e.g.* ECJ, Joined Cases 103/77 and 145/77 *Royal Scholten-Honig* [1978] E.C.R. 2037, para. 26; ECJ, Case 300/86 *Van Landschoot* [1988] E.C.R. 3443, para. 9; ECJ, Case C-292/97 *Karlsson* [2000] E.C.R. 2737, para. 39; ECJ, Case C-81/05, *Anacleto Cordero Alonso* [2006] E.C.R. I-7569, para. 37. See also ECJ, Case C-227/04 P *Lindorfer* [2007] E.C.R. I-6767, para. 50 ("general principle of equality of the sexes").

386 In particular Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] O.J. L180/22 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] O.J. L303/16.

387 See Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 88 *et seq.*

388 See n. 383, *supra*.

26 ICCPR,[389] prohibiting discrimination on similar grounds. Interesting to note in this regard is that the preamble to the ICCPR refers to the Universal Declaration of Human Rights, Article 15(2) of which provides in part that "no one shall be arbitrarily deprived of his nationality".[390] This reinforces my belief that Article 26 ICCPR should be applied to cases of loss of nationality. A third important guiding source will obviously be the Charter of fundamental rights,[391] which contains a chapter on "equality" (Article 20 *et seq.*).

Until now, the ECJ has only ever assessed the compatibility of a Member State's nationality law with the principle of equal treatment in a number of "staff cases".[392] Traditionally, the nationality laws of a number of Member States provided that foreign women acquired the nationality of their husband upon marriage.[393] As a consequence of this legislation, the applicants in the said staff cases – all women working as Union officials – were not or no longer entitled to an expatriation allowance, because they had obtained through their marriage the nationality of the Member State in which they were working.[394] They argued that this constituted discrimination on grounds of sex, as no similar rule applied to men in the same situation. The ECJ held that the term "nationals" in the Staff Regulations had to be "interpreted in such a way as to avoid any unwarranted difference of treatment as between male and female officials […]".[395] Accordingly, it refused to interpret the term "nationals" in the Staff Regulations as referring to a nationality imposed by the nationality law of a Member State on a female official, and which she was unable to renounce.[396] This case law has now been explicitly enshrined in annex VII to the Staff Regulations.[397]

---

389 International Covenant on Civil and Political Rights of 19 December 1966 (UNTS, Vol. 99, p. 171). The ICCPR has been ratified by all EU Member States. The ECJ referred expressly to it in several cases. See *e.g.* ECJ, Case 374/87 *Orkem* v. *Commission* [1989] E.C.R. 3283, para. 31; ECJ, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] E.C.R. I-3763, para. 68; ECJ, Case C-249/96 *Grant* [1998] E.C.R. I-621, replace 43-47; CFI, Case T-48/96 *Acme Industry* v. *Council* [1999] E.C.R. II-3089, para. 30.

390 This provision was explicitly relied on by the ECJ in *Rottmann* (see the discussion under V.A.2, *supra*).

391 Charter of Fundamental Rights of the European Union, [2010] O.J. C83/389.

392 See the overview in Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 46 *et seq.*

393 This rule does no longer unconditionally apply in any of the Member States. It must be pointed out that it was targeted by a number of international conventions. See *e.g.* Convention on the Nationality of Married Women, Article 1 of which provides that neither the celebration nor the dissolution of marriage shall automatically affect the nationality of the wife. This Convention was ratified by 18 Member States: http://www.unhchr.ch/html/menu3/b/treaty2.htm. See, similarly, Article 9(1) of the Convention on the Elimination of All Forms of Discrimination against Women. Stating: "States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband". That Convention was ratified by all Member States. See further, Article 4(d) ECN, providing "neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse".

394 Article 4(1) of Annex VII to the Staff Regulations provides for payment of the expatriation allowance: "(a) to officials: *who are not and have never been nationals of the State in whose territory the place where they are employed is situated*; and who during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account." (italics added).

395 See ECJ, Case 21/74 *Airola* [1975] E.C.R. 221, para. 10; ECJ, Case 37/74 *Van den Broeck* [1975] E.C.R. 235, para. 10; ECJ, Case 257/78 *Devred* [1979] E.C.R. 3767, para. 9.

396 ECJ, Case 21/74 *Airola* [1975] E.C.R. 221, para. 12.

397 Article 4(3) provides "For the purposes of paragraphs 1 and 2, an official who has, by marriage, automatically acquired, without the possibility of renouncing it, the nationality of the State in whose

These cases neatly illustrate how the principle of equal treatment can, at the level of Union law, limit the effects of conferral of nationality by a Member State. However, it is important not to overlook the peculiar *ratio legis* of the provisions regulating payment of the expatriation allowance.[398] The Staff Regulations indeed make entitlement to an expatriation allowance dependent on nationality, more precisely on not having the nationality of a certain Member State.[399] However, nationality only plays an ancillary role in determining the persons so entitled. The primary criterion for the purposes of the grant of an expatriation allowance is that of "actual change of residence".[400] This makes for a strong argument to disregard national provisions on nationality where the person concerned has actually changed his or her residence in order to take up employment with the EU. For this reason, the "staff cases" should probably be confined to their specific facts and not be considered as a generally applicable precedent as far as the application of the right to equal treatment to the nationality rules of the Member States is concerned. The ECJ would most probably not have pronounced similar judgments outside these specific circumstances, at least not at the time the staff cases were pronounced. In this connection, the fact should not be overlooked that the staff cases were all pronounced in the 1970s, and hence long before the advent of the Union citizenship.

As I have argued higher, since the introduction of Union citizenship, the case for testing the nationality rules of the Member States against principles of Union law has become much stronger. In cases where the nationality rules of the Member States would affect Union citizenship,[401] infringements of the right to equal treatment should therefore be considered to be contrary to Union law more generally, *i.e.* also outside the specific context of cases dealing with the Staff Regulations. Moreover, it is submitted that this should not be limited to cases of *conferral* of nationality, but also applies for cases of *loss* of nationality.[402] Indeed, it will, from a fundamental rights perspective, ordinarily be a much more serious matter to be deprived of a nationality than to gain one. Similarly, it can be argued that a *refusal* of Member State nationality to certain groups on the basis of discriminatory criteria should be considered invalid under Union law. One example could be the fact that certain Member States have introduced "integration tests" which must be passed in order to acquire the nationality of that Member State, but have at the same time exempted from this test nationals from certain western States.[403] It has been argued that these criteria are discriminatory.[404]

---

territory his or her place of employment is situated, shall be treated in the same way as an official covered by the first indent of paragraph 1(a)".

398 See the discussion in Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 54 *et seq*.

399 *Supra*, n. 394: only officials not having the nationality of the Member State in which they work are entitled to an expatriation allowance.

400 See ECJ, Case 21/74 *Airola* [1975] E.C.R. 221, paras 6-7: "In accordance with the general pattern of article 4 of annex VII this provision adopts the official's habitual residence before he entered the service as the paramount consideration in determining entitlement to an expatriation allowance. The official's nationality is regarded as being only a subsidiary consideration, *i.e.* as serving to define the effect of the length of such residence outside the territory in which the place where he is employed is situated".

401 Such would on the facts of the staff cases, probably not have been the case, since Member State nationality was imposed upon persons who already possessed the nationality of a Member State.

402 See Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 99.

403 I will not deal with this subject in detail, because it is so vast and touches upon fundamental issues of immigration policy which can not appropriately be discussed in the context of this chapter. For insightful discussions, see the contributions in Van Oers, Ersbøll and Kostakopolou (eds.), *A Redefinition of Belonging? Language and Integration Tests in Europe* (The Hague, Brill Publishers/Martinus Nijhoff Publishers, 2010), 338 pp. and in Guild, Groenendijk and Carrera (eds.), *Illiberal Liberal States: Immigration, Citizenship, and Integration in the EU* (Farnham, Ashgate Publishing, 2009), 414 pp., in

Similarly, the content of these tests could be determined in such a way that certain groups can more easily satisfy them than others. As such, they could also give rise to a form of prohibited discrimination. One example could be the naturalisation tests applicable in the Baltic States.[405] It has been argued that the requirement of high proficiency of one of the Baltic languages unreasonably discriminates against Russian-speaking minorities and that such could constitute an indirect discrimination on grounds of ethnic origin.[406] I do not have the space to elaborate these arguments in detail here. More important is to flag the possibility that nationality rules can infringe the right to equal treatment.

It already appears from the foregoing that there is no good reason to limit possible violations of the right to equal treatment by nationality measures to cases of discrimination on grounds of sex. The reasoning followed can be applied to alleged discriminations on most of the other grounds mentioned higher. For instance, a Member State making loss of nationality dependent on criteria such as race, religion, sexual orientation[407] or political opinion could convincingly be held to violate the right to equal treatment. In the case of nationality legislation making a distinction on grounds of race, the Convention on Racial Discrimination[408] may serve as an extra guideline for assessing discrimination. Article 5 of that Convention explicitly refers to the right to nationality as one of the rights States Parties undertake to guarantee the enjoyment of without distinction as to race, colour, or national or ethnic origin. Only in the case of alleged discrimination on grounds of nationality, a violation of the principle of equal treatment is probably less straightforward. The reason is that the possession of another nationality is a common ground for loss of nationality.[409] Although the desirability of this ground of loss in the context of Union citizenship has been questioned,[410] it is unlikely that the loss of nationality for reasons of acquisition of another nationality will ever be held to constitute a form of discrimination on grounds of nationality, because the acquisition of another nationality would seem to bring a person in a fundamentally different situation which would justify the application of a different rule with regard to its initial

---

particular: de Groot, Kuipers and Weber; "Passing citizenship tests as a requirement for naturalisation: a comparative perspective" (p. 51-77) and Van Oers, "Justifying citizenship tests in the Netherlands and the UK" (p. 113-129). See also De Groot and Mijts, "De onwenselijkheid van een dubbele taaltoets voor naturalisandi in Aruba en de Nederlandse Antillen" (2009) *Migrantenrecht*, 366-371 (discussing a legislative proposal to subject persons willing to acquire the Dutch nationality in the Dutch overseas possessions to different integration tests than those in the Netherlands; this proposal was eventually adopted as Rijkswet van 17 juni 2010, houdende wijziging van de Rijkswet op het Nederlanderschap met betrekking tot meervoudige nationaliteit en andere nationaliteitsrechtelijke kwesties, [2010] Stb. 242).

404 Carrera and Wiesbrock, "Civic Integration of Third Country Nationals: nationalism versus Europeanisation in the Common EU Immigration Policy", *CEPS Liberty and Security in Europe Series*, *available at* www.ceps.eu/ceps/download/2179.

405 See the discussion under IV.B.2., *supra.*

406 Van Elsuwege *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 428-429.

407 Union law provides legal safeguards against discrimination on this ground. See ECJ, Case C-147/08 *Römer* [2011] E.C.R. nyr.; ECJ, Case C-267/06 *Maruko* [2008] E.C.R. I-1757.

408 International Convention on the Elimination of all Forms of Racial Discrimination, UN Doc A/811. All EU Member States signed this convention; see http://www.unhchr.ch/html/menu3/b/d_icerd.htm. The Convention has once been invoked in a staff case: CST (order of 27 September 2007), Case F-120/06 *Dálnoky* [2007] E.C.R. nyr., para. 26 (however, the plea was declared inadmissible and the Court did not itself consider the legal effects of the said convention).

409 See in this regard Article 7 of the European Convention on Nationality, which states that "A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases…(a) voluntary acquisition of another nationality…".

410 Kochenov, "Double nationality in the EU: An Argument for Tolerance" (2011) 17 *E.L.J.*, 323-343.

nationality.[411] Besides, where the nationality obtained is that of another Member State, the situation will normally fall outside the scope of Union law, since the Union citizenship status of the person concerned will not be affected.

In sum, a Member State is probably precluded by Union law from laying down criteria for the acquisition of loss of nationality which discriminate on the grounds just discussed. The precise consequences of this Union law limitation for the nationality laws of the Member States and, more in particular, the Union law consequences where a Member State acts in disregard of it, will be discussed in detail below.[412] However, I find it important to stress in this context already that withdrawal of nationality cannot be considered discriminatory where such withdrawal could have been avoided through a declaration of the person in question.[413] Indeed, as pointed out above,[414] under Union law national legislation may validly require a certain diligence on part of its citizens.

b) Reduction of Statelessness

A Member State's rules concerning loss of nationality could violate fundamental rights where they would result in an individual being rendered stateless.[415] Indeed, some authors have argued that the right to nationality is a fundamental right.[416] To determine whether the fundamental right to nationality can act as a limitation to the Member States' competence in regulating loss of nationality, essentially two questions need to be answered. First, can the right to nationality be considered to be a fundamental right? Second, if the first question is answered in the affirmative, is it among the fundamental rights that are protected within the Union legal order? If both questions are answered in the affirmative, it follows, for reasons explained above, that national rules on loss of nationality must respect the right to nationality.

I will start my analysis by pointing out that support for the view that the right to nationality is a fundamental right can be found in a number of fundamental rights instruments. Two categories must be distinguished. In the first place, some instruments explicitly enlist the fundamental right to nationality. The clearest example can be found in Article 15 of the Universal Declaration of Human Rights ("UDHR"), proclaiming that:

---

411 More precisely, it could be argued that the acquisition of the nationality of another State reduces or even breaks down the "special relationship of solidarity and good faith" between a Member State and its national, which would justify that Member State to apply particular rules to this situation (see, in this regard, ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 51).

412 See under VI., *infra*.

413 See *mutatis mutandis* ECJ, Case 37/74 *Van den Broeck* [1975] E.C.R. 235; ECJ, Case 257/78 *Devred* [1979] E.C.R. 3767.

414 See under V.C.1., *supra*.

415 Arguably, this would similarly be the case where a Member State's rules concerning acquisition of nationality would result in an individual remaining stateless, namely where the nationality of that State would be refused to him.

416 Hall, "The European Convention on Nationality and the Right to Have Rights" (1999) 24 *E.L. Rev.*, 587 *et seq*; Chan, "The Right to Nationality as a Human Right: the Current Trend Towards Recognition" (1991) 12 *HRLJ*, 1-14. See already: Lauterpacht *International Law and Human Rights* (USA, Archon Books, 1968), 346 *et seq.*, who states that every person should be entitled to the nationality of the State where he is born, but without considering nationality to be a "natural" or "inalienable" right. See further the discussion in Hailbronner, "Nationality in Public International Law and European Law", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses* (Amsterdam, Amsterdam University Press, 2006), 37-46.

> "1. Everyone has the right to a nationality.
> 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

The only enunciation of a general right to nationality in a legally binding fundamental rights treaty can be found in Article 20 of the Inter-American Convention on Human Rights.[417] Very interesting to note in this regard is a celebrated opinion of the Inter-American Court of Human rights,[418] in which it states that "[i]t is generally accepted today that nationality is an inherent right of all human beings…". Some other conventions contain the right to nationality in a more limited form. A good example is Article 24(3) of the ICCPR, which states that *every child* has the right to acquire a nationality.[419] In the second place, there are a number of international conventions aiming at the reduction of cases of statelessness. These conventions do not refer to the right to nationality as a fundamental right, but they could be said to implement that right and provide it with substantive content, in that they impose concrete obligations upon States in order to reduce statelessness.[420] The most important of these conventions is probably the United Nations Convention on the Reduction of Statelessness,[421] Article 8 of which provides:

> "1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.
> 2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:
> (a) in the circumstances in which, under paragraphs 4 and 5 of article 7, it is permissible that a person should lose his nationality;
> (b) where the nationality has been obtained by misrepresentation or fraud."

Also very important are Articles 7 and 8 of the European Convention on Nationality, which will be discussed below.[422] A third example is Article 9(1) of the Convention on the Elimination of All Forms of Discrimination against Women, stating that States Parties shall ensure that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, *render her stateless* or force upon her the nationality of the husband.[423]

The foregoing makes clear that there is some room for arguing the existence of a fundamental right to nationality. A different matter, however, is whether this right is protected in the Union legal order. It will be recalled that in protecting fundamental rights the ECJ will take as a guideline the constitutional traditions of the Member States and international treaties for the protection of fundamental rights on which the Member States have collaborated or of which they are signatories. However, there is no indication that the right to nationality is part

---

417 Article 20 of that Convention states: "1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it".

418 RE Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984).

419 Italics added. A similar principle can be found in Principle 3 of the UN Declaration of the Rights of the Child.

420 Chan, "The Right to Nationality as a Human Right: the Current Trend Towards Recognition" (1991) 12 *HRLJ*, 4.

421 989 UNTS 175. 13 Member States have ratified the Convention, whereas France has only signed it: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/treaty4.asp. This is deemed sufficient by the ECJ in order to take it into account as a guideline (see ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 52).

422 See under V.C.2.c., *infra.*

423 Italics added.

of the constitutional traditions of the Member States. Besides, one cannot fail to notice that far from all Member States are party to the conventions just mentioned (and obviously none of them is party to the Inter-American Convention), and that the obligation to reduce statelessness is often subject to sweeping qualifications. Still it must not be forgotten that, in accordance with the case law referred to above,[424] the fact that not all Member States are party to a convention does not preclude the ECJ from taking into account as a guideline. Accordingly, the ECJ in *Rottmann* explicitly relied on both Article 15 UDHR and Article 8 on Convention on the Reduction of Statelessness.[425] However, the ECJ was not concerned with enforcing the right to nationality. Rather conversely, it found confirmation in the said articles of the right for the Member States to deprive a person of his or her nationality under certain circumstances.[426] Finally, it must be pointed out that

The bottom-line is probably that at present the right to nationality is not as such protected by Union law as a fundamental right, at least not in the sense that stateless persons must be given the right to acquire the nationality of a Member State. At the same time, it appears that Union law does limit the cases in which a Member State may withdraw its nationality. This is confirmed by the explicit reference by the ECJ in its *Rottmann* judgment to Article 15 UDHR and Article 8 on Convention on the Reduction of Statelessness. The European Convention on Nationality is of particular importance in this regard (see the discussion below). In this sense, the duty to reduce or avoid statelessness does arguably function as a limitation sanctioned by Union law to the Member States' competence concerning nationality.

c) European Convention on Nationality[427]

One could wonder what the role of the European Convention on Nationality ("ECN") may be in this context. The ECN is very important in that it not only proclaims a general right to nationality (Article 4(a) ECN), but at the same time endows this right with substance as a conventional norm giving rise to specific obligations on State parties.[428] More specifically, with regard to loss of nationality, the ECN provides for an exhaustive list of grounds for loss of nationality.[429] In this regard the Convention goes further than previous conventions. Any withdrawal done for a reason not specifically mentioned will violate the ECN (Article 7 ECN)). That Article provides as follows:

> 1. A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases:
> a. voluntary acquisition of another nationality;
> b. acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;
> c. voluntary service in a foreign military force;
> d. conduct seriously prejudicial to the vital interests of the State Party;

---

424 See the case law referred to in n. 382 and 383, *supra*.

425 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 52 and 53.

426 The ECJ referred to Article 15(2) UDHR and Article 8 of the Convention on the Reduction of Statelessness.

427 The European Convention on Nationality was adopted by the Council of Europe's Committee of Ministers on 15 May 1997, and opened for signature on 7 November 1997. It entered into force on 1 March 2000.

428 Hall, "The European Convention on Nationality and the Right to Have Rights" (1999) 24 *E.L. Rev.*, 595.

429 For a detailed overview and discussion of these grounds, see De Groot, "The European Convention on Nationality: A Step Towards a Ius Commune in the Field of Nationality Law" (2000) 7 *MJ*, 139 *et seq.*; Schärer, "The European Convention on nationality" (1997) 40 *German Yearbook of International Law*, 438-460.

> e. lack of a genuine link between the State Party and a national habitually residing abroad;
> f. where it is established during the minority of a child that the preconditions laid down by internal law which led to the ex lege acquisition of the nationality of the State Party are no longer fulfilled;
> g. adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.
> 2. A State Party may provide for the loss of its nationality by children whose parents lose that nationality except in cases covered by sub-paragraphs c and d of paragraph 1. However, children shall not lose that nationality if one of their parents retains it.
> 3. A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless, with the exception of the cases mentioned in paragraph 1, sub-paragraph b, of this article.

The same is true where withdrawal of nationality is discriminatory (Articles 4c and 5(1)) or where it results in statelessness, albeit subject to certain exceptions (Articles 4b, 7 and 8).[430]

Obviously, the Convention is not the product of the EU, as it was adopted within the Council of Europe. It is not self-evident therefore how it could play a role within the framework of Union law. A number of options can be envisaged in this connection. First of all, it is possible to regard the ECN as an international convention on fundamental rights, more precisely on the fundamental right to nationality. It is clear, moreover, that many Member States contributed to its drafting (EU Member States make up for the majority of the Members of the Council of Europe[431]), and a relatively large number of EU Member States have ratified or at least signed the ECN.[432] Accordingly, in accordance with the *Nold*[433] case law, the ECJ could use its provisions as guidelines when applying Union law.[434] The ECJ did refer to the provisions of the ECN for the first time in *Rottmann.*[435] However, the ECJ did not refer to the *Nold* case law.[436] Rather, the Court considered that the ECN, at least Article 4(c) thereof, lays down a general principle of international law. Those provisions of the ECN which can be considered as expressing a general principle of international law should indeed, on that ground, be taken into account in the context of interpretation of Union law. This is most probably not the case for all provisions of the ECN.[437] This limitation is not an issue under the first option, namely when the ECN is treated as a fundamental rights convention and its provisions are taken into account on that ground. That option would allow the ECJ to take them into account not only with regard to Member States who have ratified the ECN and not only for those provisions that could be considered as embodying general principles of international law. This should not be taken to mean that those Member States which did not

---

430 States parties may withdraw their nationality when the person affected is thereby rendered stateless if that person's nationality was acquired by fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant (Arts. 7(1)b and 7(3)).

431 For the complete list of the Council of Europe's Member States, see http://www.coe.int/T/e/com/about_coe/member_states/default.asp.

432 As of 6 October 2011, 12 EU Member States had ratified the Convention, and another 6 had signed it without yet ratifying it. See http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=166&CM=&DF=&CL=ENG.

433 See n. 382*, supra*.

434 Hall, "The European Convention on Nationality and the Right to Have Rights" (1999) 24 *E.L. Rev.*, 598.

435 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, paras 18-21 and 52-53.

436 Besides, the ECJ appeared to attach some importance to the fact that the ECN had entered into force in both the Member States whose nationality legislation was under scrutiny in the case (ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 18), something which is not required under that case law in order for provisions of a fundamental rights convention to be taken into account.

437 See the doubts expressed by AG Poiares Maduro regarding the possibility of qualifying the provisions of the ECN as general principles of international law in the absence of ratification by all the Member States (Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 29).

ratify the ECN are nevertheless bound by it. The ECJ is not competent to enforce the ECN as such. It is only competent to use its provisions as interpretative guidelines.

Besides, it must be pointed out that in the future the ECN could play a similar role in the ECJ's case law if the latter were to consider the provisions of the ECN as expressions of constitutional traditions common to the Member States. Indeed, the ECJ has recognised principles common to the constitutional traditions of the Member States as general principles of Union law,[438] and it has had regard in this context *inter alia* to treaties which the Member States have signed.[439] At present this argument stands no real chance of success, as only a limited number of Member States have actually ratified and implemented the ECN.[440] Moreover, a number of them have issued quite a number of reservations and interpretative declarations,[441] which somehow undermines the common character of the rules even in those Member States which adopted them. All the same, the possibility cannot be excluded that in the future a broader adoption and implementation of the ECN may well lead to the result that some of its provisions will become something akin to a *ius commune* in the nationality laws of the Member States.[442] This will allow the ECJ to treat them as common constitutional principles, and enforce them as such in its case law.

In any event, since the *Rottmann* case it can no longer be disputed that the provisions of the ECN can be taken into account by the ECJ when assessing the validity of a Member State's nationality legislation under Union law. The provisions relied on by the ECJ in the *Rottmann* case did not serve to invalidate the nationality legislation under dispute, but rather confirmed its validity. All the same, in cases with a different fact setting the provisions of the ECN may act as limitation to the competence of the Member States in this field. It seems opportune therefore to have a closer look at the provisions of the ECN on loss of nationality and see how they could serve as a limitation to the competence of the Member States that can be enforced by the ECJ.

First of all, Article 4(c) ECN provides that "no one shall be arbitrarily deprived of his or her nationality". This provision was explicitly referred to by the ECJ in *Rottmann*. On the specific facts of the case, the ECJ considered that this provision was not violated as the withdrawal of nationality in question was based on fraud. In other circumstances it could be violated, however, namely if a Member State were to withdraw its nationality in the absence of fraud or any other acceptable ground, like the ones mentioned in Article 7 ECN.[443] Article 4(c) ECN would in such a case be an important additional argument to hold such a decision to infringe Union law. Second, Article 5 ECN elaborates the principle of discrimination in matters of nationality by explicitly enlisting different grounds of prohibited discrimination. It states that a State Party's nationality laws must not "contain distinctions or include any practice

438 See, in general, Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 720 *et seq.*

439 See *e.g.* ECJ, Joined Cases 97-99/87 *Dow Chemical Ibérica v Commission* [1989] E.C.R. 3165, paras 14-16.

440 See n. 25, *supra*.

441 This is the case for Austria, Bulgaria, Czech Republic, Denmark, Finland, Germany, Hungary, the Netherlands, Romania, Slovakia, and Sweden: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=166&CM=&DF=&CL=ENG&VL=1.

442 As is forcefully argued by De Groot (De Groot, "The European Convention on Nationality: A Step Towards a Ius Commune in the Field of Nationality Law" (2000) 7 *MJ*, 117-157).

443 See already Greenwood, "Nationality and the Limits of the Free Movement of Persons in Community Law" (1987) *YbEL*, 193 (stating that arbitrary deprivation of nationality would violate Union law).

which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin". This could well provide the ECJ with an extra argument[444] to find Member State rules which make loss of nationality dependent on one of the grounds mentioned in Article 5 ECN to be in violation of Union law.

A third important provision is Article 7 ECN. As was stated above, Article 7 lists a limited number of grounds which may be provided for in a State Party's internal law as grounds for the loss of its nationality *ex lege* or at the initiative of the State Party. This provision can assist the ECJ in assessing compliance with the principle of proportionality in the sense that the State's interest in withdrawing nationality will carry more weight when its decision is based on one of the grounds of Article 7 ECN than when it is not the case.[445] It is probably not the case, however, that a Member State's nationality law providing for loss of nationality on grounds not enlisted in Article 7 will automatically infringe Union law, since not all provisions of the ECN can be considered as principles of general international law or constitutional principles common to the Member States. The bottom-line is that Article 7 cannot act in its entirety as a limitation enforced by Union law to the competence of the Member States regarding nationality, although it can be a useful guideline for the ECJ in assessing those limitations. Special mention deserves Article 7(3) ECN, which provides that States may not withdraw their nationality where it would result in the person concerned becoming stateless,[446] except in cases of fraud. This provides another ground for considering the duty to reduce statelessness as a limitation under Union law to the Member States' competence regarding nationality.[447]

In view of the *Rottmann* case, it seems appropriate to consider more in detail the exception in Article 7(3) relating to acquisition of nationality by means of fraud. Where nationality was acquired by fraud, the duty to avoid statelessness does not apply. In that event, a State may withdraw its nationality even if the person concerned thereby becomes stateless. In *Rottmann*, the ECJ affirmed that this exception also applies within the context of Union law. Member States may, in other words withdraw their nationality if it was obtained by fraud, even if the person concerned thereby becomes stateless. Kochenov has fiercely criticized this holding of the Court in *Rottmann*. He argues that the Court should have refused to apply the said exception and should have focused instead on the fundamental principle underlying it, namely the limitation of cases of statelessness. He sees the Courts judgment as a step backwards from the *Micheletti* decision where the Court refused to apply the international law doctrine of a "genuine connection" and thereby preserved "both common sense and the common market".[448] In other words, Kochenov seems to argue that the exception based on fraud should not apply where the withdrawal of nationality leads to loss of Union citizenship, at least with regard to a person who had previously validly held the nationality of a Member State and hence Union citizenship.[449]

---

444 In addition to the general argument based on the fundamental right to equal treatment (see under V.C.2.a., *supra*).

445 See the discussion under V.C.3., *infra*.

446 See also Article 4(b) ("statelessness shall be avoided) and Article 8(1) (expressing the principle with regard to renunciation of nationality).

447 See the discussion under V.C.2.b., *supra*.

448 Kochenov, "Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters" (2010), *available at* http://ssrn.com/abstract=1593220.

449 See also Kochenov, "Case C-135/08 *Janko Rottmann* v. *Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported" (2010) 47 *CML Rev.*,1842-1845.

I do not agree with this criticism. Rules of international law do apply within the Union legal order and the Court should enforce them. This means that the Court should enforce both the duty to avoid statelessness and the exceptions accepted thereto under international law. This position applies with full force in the field of nationality, given the existing political sensitivity and implications for the sovereignty of the Member States. It is only exceptionally that rules of international law should be left unapplied, namely where they conflict with principles of primary Union law, such as general principles of Union law and fundamental rights.[450] This does not imply that the exception related to fraud should be left unapplied entirely.[451] It should only be left unapplied when the withdrawal of nationality would conflict with one of the principles of primary Union law discussed in this chapter. This explains the Court's holding in *Rottmann* that even where Article 7(3) ECN is complied with, the principle of proportionality can still be infringed. Besides, the parallel drawn with the *Micheletti* case is mistaken. As explained above, the rationale for the Court's holding is that the Member States retain competence to regulate nationality, they must unconditionally respect the same competence with other Member States. Not applying the international law doctrine of the "genuine connection" in the context of Union law serves to respect the competence of the Member States to regulate their nationality, while at the same time guaranteeing the uniform application of the citizenship provisions throughout the Union. No such considerations apply in favour of leaving the fraud-based exception unapplied, since that would not allow Member States to apply their nationality law and since in this case there is no danger of the person concerned enjoying different citizenship rights in different Member States.

Lastly, it seems important to consider Article 9 ECN, which provides that:

> "Each State Party shall facilitate, in the cases and under the conditions provided for by its internal law, the recovery of its nationality by former nationals who are lawfully and habitually resident on its territory."

This could serve as a limitation in cases such as the *Rottmann* case, where the legislation of a Member State makes it very difficult for former nationals to recover their old nationality. In *Rottmann*, Article 9 ECN is referred to among the "relevant provisions of international law", under the heading "Legal context".[452] The ECJ did not, however, refer to this provision for the assessment of the validity of the Austrian legislation at issue. The reason was, as explained above, that the Austrian authorities had not yet taken a decision regarding the possible recovery of Mr. Rottmann's Austrian nationality.[453] Suppose, however, that the Austrian authorities finally do not give Mr. Rottmann reasonable opportunities to recover his Austrian nationality.[454] Such would seem to infringe Article 9 ECN, which, as I have argued, can be taken into account by the ECJ. Below I will argue that a Member State making it too difficult for former nationals to recover their nationality could hurt the principles of proportionality and of sincere

---

450 For a possible example, see ECJ, Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] E.C.R. I-6351.

451 In particular, in the case of third country nationals who obtain the nationality of a Member State by fraud, it seems defensible that withdrawal of nationality should be held permissible under Union law. Where this withdrawal works retroactively, such a person could even be said to have never had the status of Union citizen.

452 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 21.

453 For criticism of the ECJ's timid position, see Oosterom-Staples, "Het internationale recht als beschermengel van de exclusieve bevoegdheden van lidstaten inzake verlies van nationaliteit?" (2010) *N.T.E.R.*, 190 (who finds the Court's judgment on this point unsatisfactory because it does not make explicit what duties Union law imposes on Austria in this connection).

454 It seems rather likely that this is the case applied to the facts of the case: as explained higher, Mr. Rottmann does not seem to be satisfying the conditions for reacquisition of his Austrian nationality (see n. 263, *supra* and accompanying text).

cooperation.[455] Article 9 ECN would seem to be an additional argument for holding such legislation to be in violation of Union law. The only problem with this argument could be the requirement of being "lawfully and habitually resident" on the territory of the Member State concerned. The person who has lost his nationality will not always be resident in his "old" Member State and, given that he is no longer a national of that State, he will not always be legally entitled to reside in that State. In this sense, Article 9 ECN is probably less stringent a limitation to the Member States' competence than the principle of sincere cooperation.

d) Fundamental right to respect for family life

The fundamental right to respect for family life, laid down in Article 8 ECHR[456] and Article 7 of the Charter,[457] has played an important role in a vast number of ECJ cases.[458] It is clear from this case law that it is among the fundamental rights protected in Union law[459] and that, where Member States act within the scope of Union law, respect for Article 8 ECHR is always required. On this ground it can be argued that a Member State may not, without due justification, provide for loss of nationality where this would lead for the person concerned in the loss of the right to live with his family members. An example may illustrate this point. Suppose that a Union citizen, living with his (EU) family members in his home Member State, were to lose his only Member State nationality. This could have as a consequence that he would no longer be entitled to reside in his own right in the Member State concerned, nor as a family member of Union citizens under Union law, since that right is not applicable to one's home Member State.[460] Suppose that the person in question was living, instead, in another Member State than his home Member State. Even then he might not have the right to reside with his family members in that State, namely where the conditions surrounding the residence rights of family members of a Union citizen laid down in Directive 2004/38 were not fulfilled. The loss of the right to reside with one's family members is, in both cases, the pure result of the withdrawal of Member State nationality,[461] which could on that ground run

455 See *infra* under V.C.3. and V.C.4., respectively.

456 Article 8 ECHR provides: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

457 Article 7 of the Charter provides: "Everyone has the right to respect for his or her private and family life, home and Communications".

458 *E.g.* ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279; ECJ, Case C-459/99 *MRAX* [2002] E.C.R. I-6591; ECJ, Case C-157/03 *Commission v Spain* [2005] E.C.R. I-2911; ECJ, Case 441/02 *Commission v Germany* [2006] E.C.R. I-3449; ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719; ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241

459 See *e.g.* ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, para. 41; ECJ, Case C-540/03 *European Parliament v Council* [2006] E.C.R. I-5769, para. 52; ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607, paras 58-59; *Metock and Others*, Order of 17 April 2008, para. 14.

460 This results from the fact that Directive 2004/38 does not apply in "purely internal situations"; see ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 76-78. This would be different in exceptional circumstances only (see ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr and the detailed discussion in Chapter 4, *infra*).

461 Before the withdrawal of Member State nationality the person concerned would have the right to join his EU family in their Member State of residence. He would derive this right from Directive 2004/38 (for Member States other than the one of which he was a national) or from international law (for the Member State of which he was a national; this right cannot be made conditional, see ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, para. 31).

counter to Article 8 ECHR.[462] An implicit endorsement of this reasoning can be seen in *Rottmann*, where the Court instructed the national courts, when assessing the validity of a withdrawal measure, to consider the consequences thereof "for the person concerned and, if relevant, *for the members of his family*".[463]

It must be emphasised, however, that infringements of the right to respect for family life can be justified under Article 8(2) ECHR, which allows the Member States a considerable scope of discretion.[464] In fact, the ECtHR has consistently held that Article 8 ECHR will only be violated in the most exceptional circumstances.[465] The assessment of justifications under Article 8(2) ECHR will require a delicate balancing act between the interests of the individual in having his family life protected against the interest of the State in protecting the special bond of allegiance with its nationals. As such, the assessment of the compliance with Article 8 ECHR is a special instance of assessing compliance of the principle of proportionality, which I will discuss in detail below. Below I will argue that the loss of the right to reside in one of the Member States together with one's family members is one of the elements to be taken into account under the principle of proportionality and which may tilt the balance in favour of the individual concerned by the disputed nationality measure.

3. Principle of proportionality

The only principle of Union law that has ever been explicitly treated by the Court as a limitation to the competence of the Member States regarding nationality is the principle of proportionality. In *Rottmann*, the ECJ confirmed that a withdrawal of Member State nationality, where it entails the loss of Union citizenship, will only be valid under Union law if it respects the principle of proportionality.[466] The principle of proportionality is a general principle of Union law[467] and it also figures in the Charter of Fundamental Rights of the European Union.[468] The Court is right, therefore, to apply it in cases concerning loss of Member State nationality which entail the loss of Union citizenship.[469]

One of the essential functions of the principle is to safeguard the individual against national measures which impose excessive burdens on him.[470] Consequently, we are concerned here

---

462 As was implicitly acknowledged by the ECJ in ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 79.

463 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 56 (emphasis added). See the discussion on the principle of proportionality, *infra*, under V.C.3.

464 See the detailed discussion in Chapter 5, *infra*.

465 See, *inter alia*, ECtHR, Judgment of 24 November 1998 in Case No. 40447/98 *Mitchell v. the United Kingdom;* ECtHR, Judgment of 22 June 1999 in Case No. 27663/95 *Ajayi and Others v. the United Kingdom*.

466 The Court referred to both the Union law principle of proportionality and, where available, the principle of proportionality under the national law of the Member State (ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 55). I will only be concerned with the former in this Chapter.

467 See the discussion in Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 141 *et seq.*

468 Article 52(1) of the Charter states: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to *the principle of proportionality*, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others" (italics added).

469 See the discussion on the scope of Union law under V.B., *supra*.

470 Tridimas *The General Principles of EU Law* (2nd ed.) (Oxford, Oxford University Press, 2006), 137.

with the principle of proportionality as a mechanism to review rules or measures of the Member States.[471] The principle of proportionality requires that the contested national measure is both suitable to achieve the aim pursued (test of suitability) and does not go beyond what it is necessary in order to attain it (test of necessity).[472] The aim pursued must, moreover, be a legitimate one.[473] A third test often described in the literature on proportionality and sometimes found in the case law of the Union Courts, is the test of "proportionality *sensu stricto"*, according to which a measure will be disproportionate if it has excessive effects on the applicant's interests.[474] Accordingly, the principle of proportionality requires a balancing exercise between the objectives pursued by a measure and its adverse effects on individual freedom.[475] Specifically with regard to a national measure withdrawing nationality, this implies that the interests of a Member State in withdrawing nationality must be balanced against the interests of the individual concerned.

The loss of Member State nationality may occur for different reasons. Waldrauch distinguishes between fifteen "modes" of loss of Member State nationality, which he divides into two groups, namely renunciation of nationality, on the one hand, and loss of nationality without an explicit declaration of intent by the person concerned, on the other hand.[476] These different reasons are grounded on different concerns.[477] Some of them relate to the fact that the person concerned has acted in a disloyal way against his State or has committed a criminal offence or an act of fraud. Others relate rather to the fact that the person concerned has established links with a foreign country, for instance due to long-term residence abroad or service in a foreign army. In my view, in all the different cases just mentioned, the loss of nationality occurs because the "special relationship of solidarity and good faith"[478] between the State and its national has faded (or has never truly existed[479]). This can be the case either because the individual no longer has sufficient ties with the State in question[480] or because the individual has committed an act which disproves his loyalty or allegiance to the State.[481] The interest protected, in other words, is the special bond of allegiance between the individual and

---

471 For a detailed discussion, see Tridimas *The General Principles of EU Law* (2nd ed.) (Oxford, Oxford University Press, 2006), Chapter 5.

472 See *e.g.* ECJ, Case C-406/04 *De Cuyper* [2006] E.C.R. I-6947, para. 42.

473 *E.g.* ECJ, Case C-499/06 *Nerkowska* [2008] E.C.R. I-3993, para. 34.

474 See *e.g.* Jans, de Lange, Prechal and Widdershoven *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007), 148 *et seq.*; Jans, "proportionality revisited" (2000) *L.I.E.I.*, 240-241; de Búrca, "The principle of proportionality and its application in EC law" (1993) *YbEL*, 113. In these contributions the "necessity test" is sometimes referred to as the "least restrictive alternative test". See also the discussion in Craig *EU Administrative Law* (Oxford, Oxford University Press, 2006), 655-658.

475 Tridimas *The General Principles of EU Law* (2nd ed.) (Oxford, Oxford University Press, 2006), 139.

476 Waldrauch, "Methodology for Comparing Acquisition and Loss of Nationality", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality (Volume 1: Comparative Analyses)* (Amsterdam, Amsterdam University Press, 2006), 111 *et seq.*

477 See also the detailed report by De Groot and Vink, "Loss of Citizenship. Trends and Regulations in Europe", *EUDO Citizenship Observatory Comparative Report*, *available at* http://eudo-citizenship.eu/comparative-analyses.

478 As the Court put it in *Rottmann* (ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 51).

479 Where a conferral of nationality is annulled. This is not strictly speaking a loss of nationality (because the person concerned will, legally speaking, never have had the nationality in question), but I do consider it relevant here as the person will for a certain time have enjoyed the rights associated with Union citizenship.

480 For instance, where the individual has resided abroad for a long time.

481 For instance, where the individual has joined a foreign army or has acquired his nationality by fraud.

his or her Member State, a bond which is in some Member States defined in exclusive terms.[482] Protecting this bond is a legitimate aim, as was recognised by the ECJ in *Rottmann*.

Withdrawal of nationality is no doubt an effective and suitable (though drastic) means for this purpose where an individual is perceived by a Member State to no longer meet the described "special relationship". The necessity of the loss of nationality – in the sense of the least restrictive alternative test – is more difficult to evaluate. It would seem that, generally speaking, no other measure is as effective for severing the legal bond between a State and its nationals as a withdrawal or loss of nationality. If that is accepted, the least restrictive alternative test is satisfied, because it does not require taking into account other measures which would not achieve the aim pursued to the same extent, even if they would be less damaging to other interests, *in casu* the interests of the individual concerned.[483]

In any event, I submit that, in cases concerning nationality, the application of the principle of proportionality should focus on proportionality *sensu stricto*, *i.e.* weighing of the interests of the Member State against that of the individual concerned. This clearly appears from the Court's judgment in *Rottmann.* It should be clear that the principle of proportionality cannot function *in abstracto*, but must be "fed", so to say. The Court in *Rottmann* provided specific guidance in this regard. As the Court explained, Member States have to balance the consequences of the withdrawal decision for the person concerned and his or her family members with regard to the loss of the rights enjoyed by every Union citizen against 1) the gravity of the offence committed by that person, 2) the lapse of time between the naturalisation decision and the withdrawal decision and 3) the possibilities for that person to recover his original nationality. I will argue below that these three criteria are useful, but not exhaustive or always applicable.

As far as the interests of a Member State are concerned in providing for the loss of nationality, I already pointed out that there are many considerations which may prompt the Member States' rules or measures to this effect. However, all of them are, as I have explained, grounded in the interest of the Member State in protecting the special bond of allegiance with its nationals. Of course, the interest a Member State may have in doing so will not always be equally strong, but will vary from case to case. For instance, a Member State will have a stronger case to withdraw nationality from a person who has continuously resided abroad for more than twenty years and has acquired the nationality of a third country than from a person who has lived abroad for only a few years and has not acquired the nationality of a third country. Similarly, in the case of withdrawal based on the offence of an individual, the Member State will have a stronger case where the offence committed is more significant or harmful to the interests of that State compared to minor offences. In *Rottmann*, the Court was concerned with withdrawal based on the offence committed by Mr. Rottmann, namely fraud. That explains why the Court required the balancing of, amongst others the "gravity of the offence committed", the first criterion the Court announced. More broadly, I submit that the balancing exercise under the principle proportionality requires taking into account "the ground for loss of nationality" and the stake of the interests it protects.

---

482 This explains, for instance, why the acquisition of the nationality of another State can be considered a ground for loss of nationality. For criticism on the exclusivity views on nationality, see Kochenov, "Double nationality in the EU: An Argument for Tolerance" (2011) 17 *E.L.J.*, 323-343.

483 Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 143.

As far as the individual's interests are concerned, account must be taken of the loss of the rights associated with Union citizenship. This can, as the Court in *Rottmann* rightly states, have consequences not only for the person concerned, but also for his or her family members. Indeed, one of the rights enjoyed by Union citizens is the right to be joined or accompanied by close family members.[484] Loss of Union citizenship may have as a consequence, therefore, that the person concerned will no longer be able to live with his or her family members in the Member State where they used to live. In the latter case, the interest of the individual may amount to a fundamental right, namely the right to family life, which warrants special protection in the Union legal order.[485] Such obviously enhances the case of the individual concerned and may justify the conclusion that the withdrawal was disproportionate.[486] It would seem that individuals similarly have a stronger case when other fundamental rights are violated, for instance the right to nationality in the case of an individual who became stateless.

The second criterion announced by the Court in *Rottmann* obliges Member States to take account of the length of time between naturalisation and withdrawal of nationality. Just like the first criterion, this criterion is relevant in the circumstances of the *Rottmann* case, but not generally applicable. It will not, at first sight, be relevant with regard to individuals who were never naturalised but possessed the nationality of a Member State since birth. The second criterion seems to indicate two elements to be taken into account. On the one hand, the longer the lapse of time between naturalisation and withdrawal, the stronger the presumed links between the individual and the Member State concerned. This will enhance the case of the individual and make it more difficult to justify withdrawal.[487] On the other hand, the longer the said period, the more likely it is that the individual can invoke legitimate expectations as regards the possession of a nationality. The principle of legitimate expectations is a general principle of Union law. Consequently, this is also an element that must be taken into account.[488]

The third criterion announced by the Court refers to the possibilities for the recovery of an individual's initial nationality. Again, this criterion is not generally applicable. It will only apply where the individual concerned initially possessed the nationality of another Member State. The possibilities for recovery in such a case are relevant because, where it is easy to reacquire one's original Member State nationality, the individual concerned will eventually not have to suffer the loss of Union citizenship. More generally, one could say that an individual will be less deserving of protection where he or she can limit the harsh consequences of the loss of his nationality. For instance, an individual who could have prevented the loss of nationality from happening by making a simple declaration seems less worthy of protection.[489] His interests will carry less weight when assessing whether the principle of proportionality was complied with.

---

484 See Article 3(1) of Directive 2004/38/EC.

485 See the discussion under V.C.2, *supra*.

486 ECJ, Case 44/79 *Liselotte Hauer* [1979] E.C.R. 3727, paras 23 and 30 (a measure is disproportionate if it impinges upon the "substance" of fundamental rights).

487 In this connection a parallel with the case law of the ECJ can be made. In recent cases the ECJ has stated that a Member State may not without due justification deny certain benefits to nationals from other Member States who are sufficiently integrated (see, in particular, ECJ, Case C-209/03 *Bidar* [2005] E.C.R. I-2119). Drawing an analogy, one could say that, similarly, Member States cannot without due justification deny individuals who are sufficiently integrated the very status that gives access to claims to these benefits, namely Union citizenship.

488 See the discussion under V.C.5., *infra*.

489 See n. 374, *supra*.

The third criterion seems also to refer to the "procedural dimension" of proportionality.[490] In this sense, the principle of proportionality requires that a measure which restricts an individual's rights is surrounded by sufficient procedural guarantees, such as administrative procedures that allow the individual to effectively assert his rights or the availability of judicial review. In this connection, a withdrawal measure would probably be disproportionate if it did not leave a person a reasonable period of time in order to try to recover the nationality of his Member State of origin.[491] Accordingly, a Member State may be obliged to temporarily suspend its withdrawal decision.[492] The bottom-line is that the principle of proportionality requires a review not only of the substance of a national withdrawal measure, but also of the procedural conditions surrounding it, in particular its time-frame.

Balancing the different interests and elements just discussed makes it possible to consider whether a national measure resulting in a person's loss of nationality respects the principle of proportionality. The question remains, however, what the standard and insensitivity of review will be. It is submitted that it is probably only in extreme cases, *i.e.* where the interests of the individual *manifestly* outweigh those of the Member State concerned, that the principle of proportionality can be considered to be violated. Such would seem necessary in order to safeguard the Member States' principled competence in the field of nationality. Safeguarding that competence may be argued to be necessary to protect the national identities of the Member States,[493] given that nationality is without any doubt one of the elements central to that identity.

Striking in this regard is that the ECJ in *Rottmann* left the proportionality assessment entirely to the national court, while providing it with guidance. This is not without importance. As Lord Hoffmann has stated[494]:

> "The real problem about applying the principle of proportionality, or for that matter any other test of rationality, in hard cases is not whether the principle should be observed but who should decide whether it has been observed or not."

The Court's stance shows a reticence to carry out a full assessment of the validity of national rules on nationality itself. This should be no surprise: in sensitive matters, the ECJ will normally abstain from carrying out the assessment of compliance with the principle of proportionality itself.[495] Such is understandable, since the direct intervention of the Court in issues which are closely linked to State sovereignty may raise concerns of legitimacy.[496] This stance is justified, moreover, since national courts will in general be better placed to evaluate

---

490 See, in particular, Prechal, "Free Movement and Procedural Requirements: Proportionality reconsidered" (2008) *L.I.E.I*, 201-216.

491 See the Court's hint to this regard (ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 58).

492 Oosterom-Staples, "Het internationale recht als beschermengel van de exclusieve bevoegdheden van lidstaten inzake verlies van nationaliteit?" (2010) *N.T.E.R.*, 192.

493 See Article 4(2) TEU, which provides that the "Union shall respect the equality of Member States before the Treaties as well as their national identities".

494 Hoffmann, "The influence of the European Principle of Proportionality upon UK Law", in Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*" (Oxford, Hart, 1999), 109 (quoted by Jans, de Lange, Prechal and Widdershoven *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007), 143).

495 Jans, "Proportionality Revisited" (2000) 27 *LIEI*, 256. For an example of a case on Union citizenship in which the Court left the assessment under the proportionality principle to the national court, presumably because it involved an assessment of the validity of a restriction based on reasons of public policy or public security (which are closely connected to State sovereignty): ECJ, Case C-33/07 *Jipa* [2008] E.C.R. I-5157, para. 29 in particular.

496 Tridimas *The General Principles of EU Law* (2nd ed.) (Oxford, Oxford University Press, 2006), 226.

the proportionality of national measures.[497] In this regard it must be remembered that the Court has consistently held that its role in the preliminary ruling procedure is limited to providing the national court with the guidance on interpretation necessary to resolve the case before it, while it is for the national court to apply these rules, as interpreted by the Court, to the facts of the case under consideration.[498] Of course, the Court might be prepared to go further in infringement proceedings, but even there it should tread carefully and only hold that the principle of proportionality is violated in clear-cut cases, in order not to encroach upon the principled competence of the Member States in nationality matters.

Interesting to point out is that the Bundesverwaltungsgericht, the German court which made the preliminary reference in the *Rottmann* case, ruled, a few months after the ECJ judgment in the case, that the withdrawal of Mr. Rottmann's German nationality was in accordance with German law and valid under Union law.[499] It judged that the public interest in withdrawing the German nationality outweighed Mr. Rottmann's individual interest in maintaining it, considering *inter alia* the serious character of the fraud committed and the relatively short period of time between the acquisition and withdrawal of German nationality.[500] In this connection, the court considered that there was no need to further suspend the effects of the withdrawal decision, since Mr. Rottmann had already been given a considerable amount of time in order to try to reacquire the Austrian nationality and had not made diligent use of that time and of these possibilities.[501] It further pointed that the negative consequences of the withdrawal decision for Mr. Rottmann and his family members in terms of the loss of Union citizenship rights are to some extent limited. The reason is that Mr. Rottmann is married to a German spouse and enjoys in this capacity in any event a relatively well protected right of residence in Germany and a right to move to other Member States and back.[502]

Two interesting observations can be made in this regard. First, it proves the point that the ECJ's judgment leaves considerable scope to the Member States to apply their nationality laws. Even though the Bundesverwaltungsgericht diligently followed the guidance given by

---

497 Jans, "Proportionality Revisited" (2000) 27 *LIEI*, 255. See also the insightful discussion of the intensity of the scrutiny in the case law of the Union Courts in Craig *EU Administrative Law* (Oxford, Oxford University Press, 2006), 704-710. Accordingly, I do not agree with Kochenov's view that allowing the Member States to apply the test of proportionality is a "dead-end, unlikely to bring about clarity" and which "cannot result in anything other than fragmenting and obscuring the law even further" (Kochenov, "Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters" (2010)*, available at* http://ssrn.com/abstract=1593220; see, in the same vein, Konstadinides, "La fraternite europeene? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship" (2010) 35 *E.L. Rev.*, 409 *et seq.*). Rather to the contrary, I believe the Court's judgment, with the guidance it provides on the application of the principle of proportionality, shapes more clarity as regards the limitations flowing from Union law in the field of rules governing nationality. Admittedly, leaving the assessment of proportionality to the national courts can give rise to different standards of application, with possibly different outcomes in similar situations. However, it should be clear that that would be no different had the Court been prepared to assess proportionality itself in the *Rottmann* case. Moreover, in the present legal framework, where Member States remain competent to regulate nationality, diversity is inevitable (see the interesting observations in this regard in Mouton, "Réflexions sur la nature de l'Union européenne à partir de l'arrêt Rottmann" (2010) *Revue Générale de Droit International Public*, 275-279).

498 *E.g.* ECJ, Case C-253/99 *Bacardi* [2001] E.C.R. I-6493, para. 58.

499 BVerwG 5 C 12.10 of 11 November 2010.

500 *Ibid.*, para. 36.

501 *Ibid.*, paras 24-32.

502 *Ibid.*, para. 35. The court points out that on 26 September 2010 only, Mr. Rottmann requested the competent Austrian authorities to pronounce on his status under Austrian law (see BVerwG 5 C 12.10, para. 9).

the ECJ, the outcome of the case is that the German nationality rules find application without more. Accordingly, claims that the *Rottmann* judgment takes away the competence of the Member States to adopt and apply rules concerning the loss and acquisition of nationality are, once more, refuted. Second, it is clear that the fate of Mr. Rottmann's Union citizenship will depend, at the end of the day, on the decision taken by the Austrian authorities. As was already pointed out, it is somewhat regrettable in this regard that the ECJ in *Rottmann* did not address in more detail the obligations deriving for Austria from Union law. The ensuing legal uncertainty may prompt fresh legal proceedings before the Austrian courts, with possibly a new preliminary reference to the ECJ, thereby extending Mr. Rottmann's precarious situation. In particular, it may be wondered whether and to what extent the principle of sincere cooperation may require Austria to take into account the fact that Mr. Rottmann has now definitively lost his German nationality and, on that ground, be obliged to revive his Austrian nationality and his Union citizenship. In other words, it is not sufficiently clear for the moment to what extent Union law obliges the Member State to coordinate their nationality policies and take each other's nationality decisions and their effects on the Union citizenship status of the persons concerned into account. This issue will be discussed in detail below (see under V.C.4.b, *infra*).

4. Principle of sincere cooperation

a) Acquisition of Member State nationality

A further limitation to the competence of the Member States regarding nationality could be derived from the principle of sincere cooperation (sometimes also referred to as the principle or duty of loyal cooperation, loyalty or solidarity[503]) laid down in Article 4(3) TEU.[504] De Groot[505] argues that a Member State would act in breach of that principle if it were to grant its nationality to an important part of the population of a non-EU Member State without prior consultation with the Union institutions and the other Member States.[506] One hypothetical example could be the conferral by a Member State of its nationality on all inhabitants of its former colonies. He adds that the same holds true for the situation in which a Member State

---

503 See for instance, Neframi, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations" (2010) 47 *CML Rev.*, 323-359.

504 Article 4(3) TEU, in its first subpara., explicitly refers to the "principle of sincere cooperation" ("Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"). For this reason, I will throughout the text refer to the principle under this name. For a discussion of the principle, see Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 147 *et seq*.

505 De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 12; De Groot, "Naar een harmonisatie van het nationaliteitsrecht in Europa?", in X (ed.), *Het plezier van de rechtsvergelijking: opstellen over unificatie en harmonisatie van het recht in Europa* (Deventer, Kluwer, 2003), 78. See also De Groot, "The Relationship between the Nationality of the Member States of the European Union and European Citizenship", in La Torre (ed.), *European Citizenship: An Institutional Challenge* (The Hague, Kluwer Law International, 1998), 135. See also Kotalakidis *Von der nationalen Staatsangehörigkeit zur Unionsbürgerschaft: die Person und das Gemeinwesen* (Baden-Baden, Nomos, 2000), 298-299.

506 AG Poiares Maduro approvingly refers to this argument in his Opinion in *Rottmann* (at para. 30), under reference to the article by De Groot. The AG further refers to Zimmermann, "Europaïsches Gemeinschaftsrecht und Staatsangehörigkeitsrecht der Mitgliedstaaten unter besonderer Berücksichtigung der Probleme mehrfacher Staatsangehörigkeit" (1995) *EuR,* 54, specifically 62-63.

issues, without prior consultation, a declaration regarding the determination of nationals for Union purposes[507] with the inclusion of an important part of the population of a non-EU Member State, because such a declaration would have the similar effect of suddenly increasing the number of Union citizens.[508]

As I will explain, I agree with De Groot that in such a situation, under certain conditions, the principle of sincere cooperation could be violated. However, the point of view must be further qualified and substantiated in order to overcome two possible problems. First of all, it seems to be contradicted by historical precedents. As De Groot himself points out, the recent history of UK nationality law offers three examples of extending British citizenship (and therefore Union citizenship) to (part of) the population of a non-European territory.[509] In none of these instances did the European Commission or any other Member State voice protest. The same remark applies to fairly recent amendments of the treaties on dual nationality, concluded between Spain and Latin American countries, which entitled persons of dual Spanish-Latin American nationality to apply for a Spanish passport.[510] De Groot admits therefore that his argument can hold good only in what he labels "extreme circumstances".[511]

Jessurun d'Oliveira has replied that, even in "extreme circumstances", Member States remain completely autonomous with regard to nationality matters.[512] This is illustrated, the author submits, by the fact that the German reunification, which he points out led to an increase of approximately 18 million in the number of German nationals, was accepted without any objection by the other Member States and by the Union institutions. He concludes from this that even national measures leading to an "extreme" increase in the number of Union nationals are permissible under Union law and cannot be considered as a violation of the Union principle of sincere cooperation.[513] However, Jessurun d'Oliveira's reply is not wholly accurate, as De Groot has pointed out.[514] It is normally accepted that, because of the German declaration on nationality made in 1957,[515] the entire population of the German Democratic Republic (hereinafter "GDR"[516]) already belonged to the group of persons that were German for Union purposes. This was true even for Germans permanently resident in the GDR, even despite the fact the GDR was not part of the EEC at the time.[517] It cannot be seen, in this light,

---

507 See the discussion under III.A.3., *supra.*

508 See the references in n. 505, *supra.*

509 De Groot refers to the British Nationality (Falkland Islands) Act 1983, granting British nationality to all British Dependent Territories Citizens living on the Falkland Islands; the British Nationality (Hong Kong) Act 1997, granting part of the population of Hong Kong the right to opt for British citizenship; British Overseas Territories Act 2002, granting British citizenship to most British Overseas Territories Citizens. See on these acts and their effect on British nationality law, in great detail Chapter 3, *infra*.

510 See on this issue: IV.A.3, *supra*. See also, De Groot, "Latin-American European Citizens: Some Consequences of the Autonomy of the Member States of the European Union in Nationality Matters (editorial)" (2002) 9 *MJ*, 115-120.

511 De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 13.

512 Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 402. This view is shared by Kochenov (Kochenov, "Case C-135/08 *Janko Rottmann* v. *Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported" (2010) 47 *CML Rev.*, 1840).

513 Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), , 409.

514 De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 13.

515 See n. 68, *supra*, and the accompanying text.

516 Sometimes also referred to as "DDR" *(Deutsche Demokratische Republik*).

517 See, *e.g.*, ECJ, Case 14/74 *Norddeutsches Vieh- und Fleischkontor GmbH* [1974] E.C.R. 899, para. 6.

how the German reunification led to an increase in the number of Member States' nationals. Neither can the original 1957 Declaration be seen as such: it was made by the German Federal Republic at the signing of the EEC Treaty, and can for this simple reason not be considered to change any previously existing situation under the Treaties. On the other hand, there is some room to argue that the German reunification did lead to an increase in Member States' nationals if one accepts, as some authors have argued,[518] that the German 1957 declaration was to be understood as referring to Germans domiciled in the Federal Republic of Germany only.[519] The German reunification had for a consequence that, from 3 October 1990 onwards, the Länder of former German Democratic Republic acceded to the Federal Republic of Germany.[520] Hence, at the moment of reunification, German nationals resident in these Länder became Union citizens, according to the view just set out. From this point of view there is far more force to Jessurun d'Oliveira's reply.

In any event, there do not seem to be any historical precedents that could confirm De Groot's argument based on the principle of sincere cooperation. This, however, is not sufficient to reject the argument. Indeed, the events just referred to occurred before the introduction of provisions on Union citizenship and the dynamic development of the citizenship *acquis*, in particular through progressive ECJ case law. In fact, the possible influence of Union law on the nationality of the Member States is, even at present, still very much developing. It cannot be excluded therefore that if, in the future, a Member State would significantly increase its population through a change in its nationality legislation, the Union institutions would object on grounds of Article 4(3) TEU and intervene. A possible first test case could be a recent amendment to the Hungarian nationality legislation, which entered into force in January 2011.[521] Under the new legislation, which was passed in the Hungarian parliament on 26 May 2010,[522] persons of Hungarian ancestry residing abroad are entitled to apply for Hungarian citizenship as from 1 January 2011.[523] This might well result in a significant extension of Hungarian nationality to persons living in neighbouring countries, in particular

---

518 See the discussion in Bleckmann, "German Nationality Within the Meaning of the EEC Treaty" (1978) 15 *CML Rev.*, 442 *et seq.*

519 Before the German reunification, Germans *with a permanent residence in* the GDR were considered "nationals of the Federal Republic of Germany". For this reason, the German Federal Republic was able issue passports and claim as German citizens every citizen of the GDR who managed to legally or illegally leave the territory of the GDR and arrive at a consulate or embassy of the Federal Republic of Germany. See: Hailbronner, "Germany", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses* (Amsterdam, Amsterdam University Press, 2006), 218, referring to Hailbronner, "Deutsche Staatsangehörigkeit und DDR-Staatsbürgerschaft" (1981) *JuS*, 712.

520 At the same time these Länder "acceded" to the European Communities, without any amendment of the Treaties. See the conclusions of the Dublin European Council of 28 April 1990 [1990] 4 EC Bull., point I.5.

521 See "Hungarians abroad apply for citizenship under new law", *available at* http://www.politics.hu/20110104/hungarians-abroad-apply-for-citizenship-under-new-law. The Hungarian example is mentioned in this connection by Hailbronner (Hailbronner, "Nationality in Public International Law and European Law", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses* (Amsterdam, Amsterdam University Press, 2006), 91), who refers to the Hungarian 2004 referendum on dual nationality.

522 Act XLIV of 2010 amending Act LV of 1993 on Hungarian Nationality.

523 For more detailed information, see the reports on the website of the EUDO citizenship observatory: http://eudo-citizenship.eu/. For a summary of the provisions of the new law in English, see http://eudo-citizenship.eu/docs/CountryReports/recentChanges/Hungary.pdf

Slovakia, Romania and Ukraine, where a significant number of ethnic Hungarians are living according to estimates.[524]

Second, De Groot does not really explain how the principle of sincere cooperation could be violated in the suggested scenario. He seems to consider such a violation to be self-evident. However, it is not immediately clear how that principle would be violated by a "surprising grant" of Member State nationality to large groups of persons who had previously not been nationals of a Member State. We can safely assume that De Groot is concerned with the "negative side" to or the "derogatory function" of the principle of sincere cooperation,[525] which requires the Member States to "refrain from any measure which could jeopardise the attainment of the Union's objectives" (Article 4(3), third subpara., TEU).[526] Yet, De Groot does not explain which objectives of the Union could be threatened in the situation described. Much more elaborate reasoning on this point is found in a book by Hall.[527] Hall explains that there can be three grounds for concluding that the principle of Article 4(3) TEU is violated by a Member State extending its nationality.

In the first place, Hall submits that there can be a risk of "economic dislocation". Where a Member State extends its nationality *en masse* to large numbers of non-EU citizens, this could expose the Union's labour market, its market for services and any markets affected by the right of establishment to serious disruption. As such, the measure could jeopardise the Union's aim of promoting a high level of employment and guaranteeing adequate social protection[528] and, I would add, perhaps more importantly, that of establishing a functioning internal market. Of course, this reasoning only holds good in the most extreme cases. A serious disruption of the internal market would only occur if a) Member State nationality were extended to very large groups of persons, who b) would have a lower standard of living than that of EU nationals, because such would likely lead to mass emigration to EU Member States. In less extreme cases, there is no reason to assume that a large increase in Member State nationals will automatically disrupt the Union's internal market. Two examples may further clarify the point. De Groot's example of the Netherlands extending its nationality to the entire population of Surinam, its former colony, would perhaps not be covered. Surinam has a population of less than 500 000 people.[529] Even if a substantial number of Surinamese would emigrate, such would presumably not seriously affect the internal market of the EU, with its population of more than 500 million people.[530] By contrast, if the UK were to extend

---

524 See the figures cited in the "Hungary Country Report" by Kovács and Tóth, *available at* http://eudo-citizenship.eu/. Admittedly, only the extension of Hungarian nationality to persons residing in Ukraine would result in a significant increase in the number of Union citizens.

525 See Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 149.

526 For an application of this duty, see a line of cases in the field of external relations, in which it is stated that it follows from Article 4(3) TEU that: "to the extent to which [Union] rules are promulgated for the attainment of the objectives of the [Union], the Member States cannot, outside the framework of the [Union] institutions, assume obligations which might affect those rules or alter their scope." See *e.g.* ECJ, Case 22/70 *Commission v Council (AETR case)* [1971] E.C.R. 263, para. 22).

527 Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 63 *et seq.*

528 See now Article 9 TFEU. Hall refers to Article 2 TEC, which stated the Union's task of promoting "throughout the [Union] a harmonious and balanced development of economic activities […] a high level of employment and of social protection, the raising of the standard of living and quality of life".

529 Surinam has a population of 481,267 according to a July 2010 estimate (taken from the CIA World Fact Book: https://www.cia.gov/library/publications/the-world-factbook/).

530 More precisely: 501,064,212 in 2010 according to Eurostat (http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1).

British citizenship, including "for Union purposes", to all nationals of India or if France were to extend French nationality to all nationals of its former African colonies such would in all likelihood lead to serious disruptions of the internal market. The possibility of (and fear for) such disruptions caused by a significant increase is illustrated by the fact that upon accession of new Eastern European Member States the existing Member States were temporarily allowed to restrict access to their labour markets for nationals from these countries.[531]

There is another good reason for limiting possible violations based of Article 4(3) TEU for risk of "economic dislocation" to the most extreme cases only. If not, one could wonder whether, under the reasoning followed, Article 4(3) TEU would not impose on Member States with a rather flexible nationality law an obligation to make it as restrictive as possible. Indeed, if the reasoning set out above were followed through, it could be argued that flexible nationality laws lead to an increase in the number of "Union citizens", and thus to a disruption of the internal market. It is clear that this reasoning cannot be sustained. It would encroach on (and not just put a limit to) the principal competence of the Member States regarding nationality.[532]

In the second place, Hall submits that a Member State may, when conferring its nationality on persons who possess no genuine link with it, act in a deceptive or misleading way towards the other Member States, at least when this is done without prior consultation with the other Member States or the Union institutions. Such measures are said to put in peril the Union's aim of promoting solidarity among the Member States (see Article 3(3), third para., TEU). What Hall is essentially arguing is that Member States conferring their nationality in the absence of a genuine link, in the sense of the *Nottebohm* case, effectively violate Article 4(3) TEU, unless they do so after prior consultation. This point of view has the obvious difficulty of seemingly being in conflict with the *Micheletti* judgment, in which the ECJ ruled that Member States have to unconditionally accept any grant of nationality by another Member State, even in the absence of a genuine link.[533] Hall argues that that in itself does not mean that a Member State which grants its nationality in the absence of such a link could not violate Article 4(3) TEU. Hall is certainly right in pointing out that, as a matter of principle, the *Micheletti* judgment leaves room for the possibility that a nationality, even though it has to be unconditionally accepted by other Member States, was granted in violation of Union law. Indeed, as explained higher, the *Micheletti* case also stands for the dictum that Member States have to exercise their competence regarding nationality in accordance with Union law. This all comes down to the divergence noted above between the Union law framework surrounding *conferral* and *recognition* of nationality.

---

531 See the Annexes on the transitional measures to the 2003 and 2005 Acts of accession ([2003] O.J. L236 and [2005] O.J. L157). See further Cremona, "EU Enlargement: Solidarity and Conditionality" (2005) 30 *E.L. Rev.,* 3-22; Inglis, "The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible" (2004) 41 *CML Rev.,* 937-973.

532 Hall rightly observes (Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 80) that "[g]iven that many measures which are not within the [Union's] legislative competence, such as those relating to nationality…, could have a theoretically adverse impact to greater or lesser degrees on the Community's basic economic objectives, the concept of 'jeopardy' in Article [4(3) TEU] would need to imply a 'real and serious threat' if Article [4(3) TEU] were not to operate as a vehicle for the complete destruction of national sovereignty".

533 *Supra*, under IV.A.

However, Hall probably takes things too far when he argues that *Nottebohm*[534] is actually enforced by Union law as a limit to the Member States' competence in conferring nationality. In my view, *Micheletti* is probably best understood as indicating that *Nottebohm* does not apply at all in the context of the Union, and this is how most scholars have interpreted the decision.[535] Noteworthy in this regard is that AG Tesauro in his opinion in *Micheletti* explicitly stated:

> "I do not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a 'romantic period' of international relations and, in particular, in the concept of diplomatic protection; still less, in my view, is the well known (and, it is worth remembering, controversial) Nottebohm judgment of the International Court of Justice […] of any relevance."

Admittedly, the AG made this remark where he was considering possible limitations to the Member States' duty to recognise nationality, and not limitations to their competence to determine nationality. Still then, it is a strong indication that *Nottebohm* does not apply within the framework of Union law. The simple reason is that *Nottebohm* is concerned with recognition of nationality at the international level. It holds that, under certain circumstances, States may refuse to recognise, at the level of international law, the effects flowing from a nationality granted by another State. It does not impose as such any limitation to the competence of States in determining nationality. Consequently, if *Nottebohm* does not apply at the level of the duty to recognise nationality, as unambiguously results from *Micheletti*, it will simply not apply at all. It is not conceptually right to try and bring it back in through the backdoor as a possible limitation to the competence of the Member States to determine nationality. It follows that a Member State does not breach its duties under Article 4(3) TEU when it confers its nationality on a person who does not have a genuine link with it.

In the third place, Hall argues that a Member State violates its duties under Article 4(3) TEU if it confers its nationality on individuals while at the same time denying them the right of abode in (all of) its territories to which Union law applies. Such conferral is said to amount to a kind of "social dumping", by forcing the other Member States to grant the newly created Member State nationals access to their territory while escaping the same consequence itself. Probably, this should be considered tantamount then to the Union's aim of guaranteeing adequate social protection and the fight against social exclusion (Article 9 TEU). However, the argument is obviously based on a false premise. The right of abode of Member State nationals in the territory of the own Member State amounts to a purely internal situation, and in such a situation Union law does not apply and it cannot impose any restrictions therefore.[536] A restriction of the right to abode within the territory of a Member State is not, moreover, an issue related to loss or acquisition of nationality for which, as I have argued above, Member State nationality itself could be considered a sufficient link with Union law. If, on the other hand, there is a link with Union law, for example because the person in question has legally resided in another Member State, that person derives from Union law the right to reside in his own Member State under the same conditions as nationals of another Member State.[537] In that case, the scenario of "social dumping" simply does not arise.

---

534 ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ Reports 4.

535 Jessurun d'Oliveira, "European Citizenship: Its Meaning, Its Potential", in Monar, Ungerer and Wessels (eds.), *The Maastricht Treaty on European Union* (Brussels, European University Press, 1993), 81.

536 See, *e.g.*, ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 33.

537 See *e.g.* ECJ, Case C-370/90 *Singh* [1992] E.C.R. I-4265.

Building on the foregoing, I would conclude that the principle of sincere cooperation could be violated if a Member State were to extend its nationality to large numbers of previously non-EU nationals without informing and consulting the other Member States and the Union institutions – under two circumstances. A violation of Article 4(3) TEU is arguable, first of all, where the extension of nationality leads to serious disruptions of the internal market. That could only be the case in extreme circumstances, as discussed higher. Besides, I would argue that the extension of Member State nationality to nationals of a third country must be seen as an act of foreign policy which redefines the relations between the third country concerned and the EU Member States. As such, it might touch upon issues for which the EU is also competent, such as development cooperation or even CFSP. Accordingly, the extension of nationality may impact on the Union objectives in this field and in such case the principle of sincere cooperation requires the Member State to consult first. Furthermore, the unilateral extension of Member State nationality to nationals of a third county may create significant political tension between the third country concerned, on the one hand, and the EU and its Member States, on the other hand. In such a situation too, the principle of sincere cooperation would seem to require *a priori* consultations because the Union's foreign policy objectives are at stake.[538] In these extreme situations, just informing the Commission and the other Member States of an intended extension of nationality would probably not be enough. The principle of sincere cooperation probably requires in such situations to hold consultations to come to an acceptable position for all parties involved.

My conclusion would be that in a situation as described in the foregoing, the principle of sincere cooperation can probably serve as an effective Union law limitation to the competence of the Member States regarding acquisition of nationality. Besides, the principle can serve as an additional argument where a Member State in question is alleged to have breached other provisions or principles of Union law, such as fundamental rights.[539]

b) Loss of Member State nationality

I just explained how the principle of sincere cooperation could, at least in extreme cases, function as a limit to the competence of the Member States regarding acquisition of nationality. There is no *a priori* reason why it could not also limit their competences regarding loss of nationality. Specifically, one could wonder whether the principle obliges Member States to coordinate their nationality rules in such a way as to avoid the loss of Union citizenship in cases where the loss results from the fact that the rules of one Member State do not duly take into account the status of the person concerned under the legislation of another Member State.

The most relevant scenario that immediately comes to mind is the one present in *Rottmann.* Mr. Rottmann was risking to become stateless essentially because a) by acquiring the

538 On the duty to consult as derived from the principle of sincere cooperation, see the many examples cited in Temple-Lang, "The development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institution under Article 10 EC" (2007-2008) *Fordham Int'l L.J.,* 1483, at 1507 in particular and in Stroink and van der Linden (eds.), "Judicial Lawmaking and Administrative Law" (Antwerpen-Oxford, Intersentia, 2005), 29-33. See also Temple Lang, "Developments, issues and new remedies-the duties of national authorities and courts under Article 10 of the EC Treaty" (2004) *Fordham I.L.J.* 1904-1939.

539 See Dauses, "Quelques réflexions sur la signification et la portée de l'article 5 du traité CEE", in Bieber and Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts/The Dynamics of EC-Law* (Baden-Baden, Nomos, 1987), 229, at 233-235.

nationality of Member State B (Germany), he lost the nationality of Member State A (Austria), but b) when the nationality of Member State B was withdrawn, such did not necessarily lead to him reacquiring the nationality of Member State A.[540] In that case, Mr. Rottmann would end up losing his Union citizenship essentially on the ground that he did not disclose the existence of criminal persecution in another Member State for a criminal fact which would in itself never justify the loss of nationality or, even less, Union citizenship. It may be wondered whether the principle of sincere cooperation does not oblige Member States to coordinate their action in order to prevent such cases of loss of Union citizenship from happening.[541] As was already remarked, it is regrettable that the Court in *Rottmann* did not use the opportunity to clarify the exigencies deriving from this principle. It is to be hoped that future case law will fill this gap.

The principle of sincere cooperation certainly does entail positive obligations for the Member States. It obliges them to "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" (Article 4(3), second subpara., TEU). Such might, in certain circumstances oblige them to consult with each other and with the Union institutions before taking a certain course of action[542] and to coordinate their action between themselves and, more importantly perhaps, with the Commission.[543] The problem is that it is not clear which obligations deriving from the Treaties or other acts of Union law could serve as the basis for such obligation. Important to remember in this regard is that it is often argued that the principle of sincere cooperation can only create duties together with some other rule of Union law, or some principle or objective of Union law which is to be facilitated or, at least, not jeopardised.[544] One could of course, also focus on the "negative side" to or the "derogatory function" of the principle of sincere cooperation[545] and argue that the absence of coordination between the Member States in the situation described would amount to jeopardising the Union's objective of a Citizens' Europe in which the free movement of persons is guaranteed.[546] This reasoning seems far-fetched and has the danger of becoming a gateway to justifying wide Union law intrusions into the Member State's nationality laws, since it is based on such a vague and open-ended objective.

In my view it is better to treat the principle of sincere cooperation as reinforcing and complementing the principle of proportionality. Striking in this regard is that the referring court in *Rottmann* explicitly wondered whether the principle of sincere cooperation obliged

---

540 Whether this second premise is true depends of course on how the Austrian nationality provisions will be interpreted and applied in the case by the Austrian authorities. Higher I explained that the possibility of an automatic reacquisition of the Austrian nationality seems unlikely.

541 Ironically, it would seem that better coordination between the Austrian and German authorities would have prevented the *Rottmann* scenario, *i.e.* the possibility of becoming stateless and losing citizenship of the Union, from happening in the first place. If the Austrian authorities had been quicker to inform the German authorities about the pending criminal proceedings against Mr. Rottmann, the latter would presumably never have obtained the German nationality at all.

542 See the references cited in n. 538, *supra*.

543 See, for an example in the field of competition law: ECJ, Case C-94/00 *Roquette Frères* [2002] E.C.R. I-9011, para. 90.

544 Temple Lang, "The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.: Two More Reflections" (2001) *E.L. Rev.*, 84-93.

545 Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 149.

546 In this connection, one could point out that, if Member States may not without justification hinder the exercise of Union citizens, they should make sure that Union citizens do not, in the absence of the most convincing reasons, lose the status that gives entitlement to the right to free movement.

Austria, in the circumstances of that case, to permit Mr. Rottmann to reacquire the Austrian nationality.[547] The Court in its judgment did not, however, refer to the principle of sincere cooperation, but only to the principle of proportionality. It apparently saw that principle and the duties deriving therefrom as the perfect means to "prevent a lack of co-ordination between States leading to a Union citizen becoming unnecessarily stateless".[548] As argued above, the principle of proportionality requires both the Member State of naturalisation and the original Member State to duly take account of the interests of the individual concerned and of the consequences of the loss of Union citizenship for his situation. It will, in cases where the interests of the individual manifestly outweigh that of the Member State oblige them to reinstate their nationality. The principle of sincere cooperation might in such a case, moreover, oblige the Member States concerned to take each other's nationality measures into account and, where necessary, consult with each other in order to prevent the possibly disproportionate consequences of the loss of Member State nationality from happening. In this sense, the principle of sincere cooperation adds a dimension to the proportionality assessment, namely one of "connecting the dots". Indeed, taken separately, the decisions of the Member State of naturalisation and that of the original Member State may be proportionate to the aim pursued.[549] However, when both decisions are considered together, the consequences deriving therefrom for the person concerned may be disproportionate to the aims pursued.[550] The rule providing for loss of nationality on grounds of fraud, which aims at re-establishing the situation existing before the fraudulent nationality was obtained, could be said to have disproportionate consequences where it is impossible to re-establish that situation because the initial nationality was lost and cannot be reacquired. Similarly, the application of the rule regarding loss of nationality for having acquired another nationality would arguably become disproportionate if the latter nationality was retroactively withdrawn and hence in fact never acquired.[551] In this sense one could agree with AG Ruiz-Jarabo Colomer that "Citizenship of the Union…must at least guarantee that it is possible to change nationality within the European Union without suffering any legal disadvantage".[552] This broader

---

547 See ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 34 ("The national court considers that it is possible at least that the Republic of Austria, as the Member State of Dr Rottmann's original nationality, might be bound, by virtue of the duty to cooperate with the Union in good faith […] to interpret and apply its national law or to adapt it so as to prevent the person concerned from becoming stateless when, as in the case in the main proceedings, that person has not been given the right to keep his nationality of origin following the acquisition of a foreign nationality.").

548 Davies, "The Entirely Conventional Supremacy of Union Citizenship and Rights" (2010) *EUDO Citizenship Forum, available at* http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2.

549 In *Rottmann*, for instance, the German decision (withdrawal for reason of fraud) and the Austrian initial decision (loss of nationality for reason of acquisition of another nationality) seem proportionate. The arguably disproportionate consequences seem to derive from the lack of coordination between these Member States, not from their decisions in their own right.

550 An interesting parallel can be drawn with ECJ, Case C-165/91 van Munster [1994] E.C.R. I-4661, in which the ECJ held that the principle of sincere cooperation may require a Member State, when applying its legislation, to take into account the applicable legislative provisions of another Member State and to avoid applying its legislation in such a way as to create an outcome, on acoount of the combined application of the applicable provisions in both Member States which is liable to violate the aims of Union law. See the discussion in Verhoeven, *The European Union in search of a Democratic and Constitutional* Theory (The Hague, Kluwer Law International, 2011) 315-316.

551 In this sense, Hailbronner, "Nationality in Public International Law and European Law", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses* (Amsterdam, Amsterdam University Press, 2006), 94.

552 Opinion of AG Ruiz-Jarabo Colomer in Case C-386/02 *Baldinger* [2004] E.C.R. I-8411, para. 47.

perspective has the benefit that it obliges Member States to duly take into account Union citizenship and the consequences resulting from the loss thereof.

The bottom-line is that the principle of sincere cooperation could serve as a principle reinforcing the proportionality assessment. It will oblige the Member States, when applying their nationality rules to a certain person, to take into account the nationality rules applicable to that person in another Member State and to prevent situations which, if the application of all relevant rules are considered together, have disproportionate consequences for the person in question. To this end, they may be obliged to consult with each other to coordinate their action. However, in my view, it would be wrong to derive from the principle of sincere cooperation more far-reaching duties. Accordingly, I think it cannot be considered that the principle of sincere cooperation, in the scenario described, imposes a *blanco* obligation[553] on the original Member State to restore its nationality, for instance by retroactively interpreting its nationality rules as if the ground for loss of nationality had never occurred.[554] As I already pointed out, there is no Union law rule or principle which could serve as the basis for such an interpretation of the principle of sincere cooperation, except perhaps, under limited circumstances, the principle of equivalence.[555] Rather than imposing a *blanco* duty or prohibition to offer reacquisition of nationality under certain circumstances, the principle of sincere cooperation requires Member States, considering the nationality status of the person concerned in all other Member States and, possibly after consultation, to consider whether such reacquisition would be the best solution to avoid disproportionate consequences for the person concerned. It may also oblige Member States, more in general, to coordinate their nationality rules in order to avoid disproportionate consequences. Consequently, it has consequences for all Member States whose nationality is in issue, where the loss of Union citizenship is at stake, and not just for the Member State of someone's original nationality. After all it is a principle of *cooperation.* However, as I remarked when dealing with the principle of proportionality, only in fairly extreme situations can the principle oblige a Member State to confer its nationality upon a person, invalidate a nationality decision or prohibit it from withdrawing its nationality. As such, the principle of sincere cooperation respects the autonomous and principled competence of the Member State, while at the same time serving to protect the status of Union citizenship.

5. Principle of legitimate expectations

Another principle of Union law that could possibly serve as a limitation to the competence of the Member States regarding nationality, is the principle of legitimate expectations.[556] The

---

553 I mean an obligation phrased in general terms such as: "The principle of sincere cooperation obliges a Member State to offer the possibility of (re)acquisition of its nationality to an individual who has lost it on grounds of the acquisition of the nationality of another Member State if the latter nationality is later annulled and has therefore, from the point of view of the legal order of the second Member State, never been acquired at all". This obligation could be taken even one step further, namely not as an obligation to merely offer the possibility of reacquisition of nationality, but as an obligation to provide for the automatic reacquisition of nationality.

554 This duty could, in a less imposing form, also be termed as a prohibition, namely for instance: "the principle of sincere cooperation prohibits a Member State from providing for the (definitive) loss on grounds of the acquisition of the nationality of another Member State if the latter nationality is later annulled and has therefore, from the point of view of the legal order of the second Member State, never been acquired at all".

555 See Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 34.

556 See Opinion of AG Poiares Maduro in *Rottmann*, para. 31.

principle of legitimate expectations is a general principle of Union law.[557] Consequently, Member State authorities have to comply with this principle when acting within the scope of Union law.[558] Such is, as I have argued above, the case, *inter alia,* where nationality rules or decisions involve the loss of Union citizenship.

The principle of legitimate expectations takes particular importance with regard to retroactive measures. The ECJ has held in this regard that the retroactive withdrawal of a Union measure *which has conferred individual rights or similar benefits* would infringe the principle of legitimate expectations.[559] By way of an analogy, it could be argued that, where a person had a legitimate expectation that he had obtained the nationality of a Member State, a retroactive withdrawal of that nationality would be in violation of the principle of legitimate expectations. Indeed, the conferral of Member State nationality can certainly be viewed as a measure conferring important "individual rights or benefits" under Union law, namely Union citizenship and the rights associated therewith.

A retroactive measure will only be legitimate if two conditions are fulfilled: 1) retroactivity is required by the objectives of the measure pursued and 2) the legitimate expectations of those affected are duly respected.[560] As Tridimas notes, both conditions are inextricably linked. This requires the Union Courts to balance, on the one hand, the public interests which retroactivity is purported to serve and, on the other hand, the legitimate expectations of the person concerned and the extent to which these are affected.[561] As such, the principle of legitimate expectations seems to function as a sub-function of the principle of proportionality, [562] namely one requiring that, when assessing the proportionality of a measure, the legitimate expectations of the individual concerned and the specific interests of the Member State in providing for retroactivity are taken into account.

As far as the individual's legitimate expectations are concerned, foreseeability will be a central element. Accordingly, if the retroactive withdrawal was reasonably foreseeable, a breach of legitimate expectations cannot be claimed.[563] On the facts of the *Rottmann* case, for instance, it would *prima facie* be difficult to argue that the German withdrawal was not foreseeable, given that Mr. Rottmann had knowingly provided false information in order to obtain the German nationality. This links in to another element that will be taken into account when assessing whether or not legitimate interests are at stake, namely the good faith of the

---

557 There is a large body of case law of the ECJ mentioning the principle of legitimate expectations as a general principle of Union law. See *e.g.* ECJ, Joined Case C-181/04 to C-183/04 *Elmeka* [2006] E.C.R. I-8167, para. 31. For an overview, see Tridimas *The General Principles of EU Law* (2nd ed.) (Oxford, Oxford University Press, 2006), 251 *et seq.*; Craig *EU Administrative Law* (Oxford, Oxford University Press, 2006), 607 *et seq.*; Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 851-852 and Temple Lang, "Legal Certainty and Legitimate Expectations as General Principles of Law", in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (The Hague-London-Boston, Kluwer Law International, 2000), 163-184.

558 See, *e.g.*, ECJ, Joined Case C-181/04 to C-183/04 *Elmeka* [2006] E.C.R. I-8167, para. 31; ECJ, Case C-285/09 *R* [2011] E.C.R. nyr, para. 45.

559 See ECJ, Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others v Common Assembly of the ECSC* [1957] E.C.R. 81, 115*;* ECJ, Case 159/82 *Verli-Wallace v Commission* [1983] E.C.R. 2711, para. 8 (emphasis added).

560 ECJ, Case 98/78 *Racke* [1979] E.C.R. 69, para. 20; ECJ, Case C-110/97 *Netherlands* v *Council* [2001] E.C.R. I-8763, paras 151-157. These conditions were first developed by the Court in relation to Union measures, but they equally apply vis-à-vis national measures (see, *e.g.*, ECJ, Case C-459/02 *Gerekens* [2004] E.C.R. I-7315, para. 24).

561 Tridimas *The General Principles of EU Law* (2nd ed.) (Oxford, Oxford University Press, 2006), 256.

562 See the discussion in Craig *EU Administrative Law* (Oxford, Oxford University Press, 2006), 649-651.

563 See ECJ, Case 108/81 *Amylum* [1982] E.C.R. 3107, para. 21.

person concerned. A person who did not act in good faith, for example by fraudulently acquiring a Member State's nationality, cannot normally rely on the principle of legitimate expectations in order to prevent that Member State from retroactively withdrawing its nationality.[564] However, certain other elements may point in favour of the existence of a legitimate expectation that a nationality, once obtained, will not be retroactively withdrawn. One of the most important elements in this regard is, in my view, the lapse of time between the acquisition and the withdrawal of nationality. Indeed, the longer a person has had a certain nationality, the more convincing it becomes to argue that he or she had a legitimate expectation that it would not at some point in time be retroactively withdrawn. The Court in *Rottmann* seems to have implicitly confirmed this interpretation of the principle of legitimate expectations. Admittedly, it did not refer to that principle explicitly, but it did instruct the national court to take account of "the lapse of time between the naturalisation decision and the withdrawal decision" when assessing whether a withdrawal was proportionate.[565] Another element to be taken into account, which again links in to the previous one, is the *reliance* of the person concerned on the nationality which is the object of the withdrawal decision.[566] Accordingly, it could be argued that a person who has relied on his nationality, for example by making use of the rights associated with Union citizenship,[567] will have a stronger claim on the basis of the principle of legitimate expectations.

As far as the Member State's interest in retroactively withdrawing its nationality is concerned, it must be pointed out that such measure will normally serve the protection of the special bond between the State and its nationals and the reciprocity of rights and duties.[568] However, another objective pursued by retroactive withdrawal of a nationality obtained by fraud is to re-establish the situation as it had been before the acquisition of that nationality.[569] In situations such as the one in *Rottmann* such could arguably not be achieved.[570] Hence, the need for retroactivity in such circumstances will carry less weight in balancing the Member State's interest against that of the individual.

We can conclude that, in a way similar to the principle of sincere cooperation, the principle of legitimate expectations can act as a limitation to the Member State's competence regarding nationality, first and foremost, through the principle of proportionality. Particularly with regard to retroactive withdrawal of Member State nationality, it will deepen the proportionality assessment by requiring certain specific elements regarding retroactivity and the protection of an individual's legitimate expectations to be taken into account. As was

---

564 Jans, de Lange, Prechal and Widdershoven *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007), 168 (referring in particular to ECJ, Case C-336/00 *Huber* [2002] E.C.R. I-76990). See also the examples cited in Craig *EU Administrative Law* (Oxford, Oxford University Press, 2006), 617 (who remarks: "There is no moral rationale for allowing a person to claim a 'legitimate' expectation based on an initial decision that was obtained by fraud or deception.").

565 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 56. See also *supra*, under V.C.3., on the principle of proportionality.

566 Jans, de Lange, Prechal and Widdershoven *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007), 168-169 (referring, *inter alia*, to ECJ, Case 508/03 *Commission v UK* [2006] E.C.R. I-3969).

567 For instance, by travelling to another Member State and working there as an employed person.

568 See the detailed discussion of the principle of proportionality under V.C.3., *supra*.

569 Hailbronner, "Nationality in Public International Law and European Law", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses* (Amsterdam, Amsterdam University Press, 2006), 94.

570 See the discussion of the principle of sincere cooperation under V.C. 5., *supra*.

previously explained with regard to the principle of proportionality, it will only restrict the Member States discretionary competence regarding nationality in fairly extreme situations.

D. Consequences

Now that some possible limitations deriving from Union law have been established, it must be analysed what the consequences are under Union law where a Member State acts in disregard of these limitations. This analysis must take into account the consequences, not only for the Member State concerned, but also for the other Member States. Hence, the distinction explained above between conferral and withdrawal of nationality, on the one hand, and recognition of nationality, on the other hand will be relevant for this section. Given that this distinction does not necessarily run along the same lines in cases of acquisition and loss of nationality, it seems necessary to analyse the consequences of acquisition and loss in disregard of Union law limitations separately. The analysis must, moreover, take into account the consequences for the individual concerned. Hence it seems useful to consider the consequences of a refusal of nationality separately too, since, while technically a refusal of nationality depends on the criteria for acquisition of nationality, the consequences for the individual concerned will in many ways be similar to that of a loss of nationality.

1. Acquisition of Member State nationality

My analysis so far has shown that the Member States' competence regarding acquisition of nationality is subject to certain Union law limitations, such as the duty to respect fundamental rights or, in extreme cases, the principle of sincere cooperation. Once we accept that these principles of Union law impose certain limitations to the competence of the Member States to confer nationality, the next question becomes: what are the consequences when a Member State exercises this competence in a way that does not respect some or all of these limitations?

The situation occurs where a Member State enacts a piece of nationality legislation or amends its nationality legislation in a way that violates one or more of the limitations described above. One example would be a law by which a Member State confers its nationality on the inhabitants of its former colonies in a way that violates Article 4(3) TEU.[571] Another example would be an amendment of the criteria for acquisition of nationality in the sense of adding a criterion which is racist and thereby in violation of the fundamental right to equal treatment. In view of the primacy of Union law, the Member State concerned would have to change its legislation to bring it in conformity with Union law and, as long as such has not happened, Member State authorities would have to leave the legislation or the legislative provision concerned unapplied.[572] Accordingly, the administration of the Member State concerned should not confer nationalities on the basis of the contested legislation, or, where a provision or a criterion contained in a provision of that legislation was in breach of Union law, not take this provision or criterion into account when conferring nationalities. Suppose, however, that the Member State in question does not change the legislation concerned and that the national authorities refrain from dissaplying it. A similar situation also occurs where the national authorities adopt a decision conferring nationality in breach of Union law on the

571 See the discussion of the principle of sincere cooperation under V.C.4., *supra*.

572 This duty applies not only to national courts, but also to other national authorities, like administrative authorities (see, *e.g.*, ECJ, Case 103/88 *Fratelli Costanzo* [1989] E.C.R. 1839, para. 31).

basis of nationality legislation which is, in itself, in accordance with Union law. In the following I will try to determine the consequences of such situations under Union law, both with regard to the individual concerned and with regard to the Member States.

On the one hand, there can be no doubt that other Member States will have to recognise the person concerned as a national of the Member State in question, and thus as a Union citizen. This follows without more from the *Micheletti* judgment.[573] This means, for example, that they will have to allow the person concerned on their territory on condition only that he or she presents a valid identity card or passport (see Article 5 of Directive 2004/38). Moreover, the person concerned will be entitled to reside in another Member State as long as he or she satisfies the conditions of the Residence Directive, and be entitled there to equal treatment compared to nationals of that Member State (Article 24 of the Directive). He or she will also have the right, under certain conditions, to be joined by third country family members in that State.[574]

On the other hand, the limitations imposed by Union law could be enforced before the ECJ in infringement proceedings brought against the Member State in breach by the Commission (Article 258 TFEU) or by any other Member State (Article 259 TFEU). If the ECJ considers that the Member State acted in breach of Union law by enacting a specific piece of nationality legislation or by conferring its nationality upon a certain person, it will require the Member State in question to take the necessary measures to comply with the judgment (Article 260(1) TFEU). However, such a judgment is purely declaratory and does not operate to annul the national measure.[575] Moreover, the ECJ does not have power to require specific measures in order to give effect to the judgment.[576] As a consequence, the nationality law in question, or the specific decision conferring nationality, will remain in force.[577] Obviously, the judgment finding an infringement of Union law puts the Member State under a duty to take the necessary measures to comply with the ECJ's judgment (Article 260(1) TFEU). If it fails to comply with the judgment, the Commission can initiate an action on the basis of Article 260(2) TFEU[578] and the ECJ can impose a lump sum, a penalty payment or even both.[579] The incompatibility of a national nationality law with Union law, in particular of the criteria for acquisition of nationality contained therein, could also be determined by the ECJ more indirectly in a procedure on a preliminary ruling from a national court from the Member State concerned.

Two scenarios must be distinguished. In the first place, it is possible that the Court finds the *nationality legislation* (as opposed to an individual measure) of the Member State in question to infringe Union law. Take the hypothetical example of a Member State modifying its nationality law so as to make it possible for all residents of its former colonies to claim its nationality by way of a simple declaration. Suppose this were held by the ECJ to constitute a

---

573 See the discussion under IV.A., *supra*.

574 On this right, see *e.g.* ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1; ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241.

575 Lenaerts, Arts and Maselis (Bray (ed.)), *Procedural Law of the European Union* (2nd ed.) (London, Sweet & Maxwell, 2006), 167.

576 *Ibid.*

577 Consequently, the person in question will remain a national of that Member State, and hence a Union citizen (see Article 20(1) TFEU).

578 See, in detail, Lenaerts, Arts and Maselis (Bray (ed.)), *Procedural Law of the European Union* (2nd ed.) (London, Sweet & Maxwell, 2006), 171-172.

579 See ECJ, Case C-304/02 *Commission v France* [2005] E.C.R. I-6263, para. 82.

violation of Article 4(3) TEU, because it would lead to "economic dislocation".[580] As a consequence of that judgment, the Member State in question would be required to change its legislation to comply with the judgment, most probably by imposing stricter conditions in order to acquire its nationality. In any case, the Member State authorities, including national courts, would have to refrain from applying the legislation in question any further.[581]

In principle, a Member State found to be acting in breach of Union law will not only be required to change its legislation for the future, it will also be required to take away the past effects of the measure in breach of Union law.[582] Applied to the facts of our example, this would imply that the Member State in question would be required to withdraw its nationality from those persons who acquired it under the contested nationality legislation. However, such an imposed withdrawal of nationality is problematic, because it could result in a violation of the fundamental rights of the persons concerned,[583] for example by rendering them stateless or depriving them of the right to reside in the same country as their family members. By way of an example: if a family member of a Union citizen were to lose his Member State nationality he would, in a situation that has no link with Union law, lose the right to reside with his family members, at least as far as Union law is concerned.[584] The loss of this right, which is the pure result of the withdrawal of Member State nationality,[585] could run counter to Article 8 ECHR.[586] Moreover, an imposed withdrawal of nationality could hurt the principle of legitimate expectations[587] or the principle of proportionality.[588]

It is inconceivable that Union law, through the requirements flowing from an ECJ judgment, would mandate a Member State to violate such fundamental principles of the Union legal order as fundamental rights, the principle of legitimate expectations or the principle of proportionality. The better view is probably that, where retroactive withdrawal of nationality hurts one of these principles, the ECJ should limit the effects of its judgments holding a Member State's nationality law to infringe Union law to the future. Admittedly, the ECJ will take such a step in exceptional circumstances only.[589] However, it is submitted that in the cases concerned here, such a limitation can perfectly be justified, given the far-reaching consequences a withdrawal of nationality may have for the legal position of the individual(s) concerned, namely the loss of the rights attached to the status of Union citizenship and the fact that the persons concerned will normally have acted in good faith when deciding to exercise these rights. Moreover, should a Member State fail to change its legislation after a judgment declaring its failure to fulfil its obligations, and later be held by the ECJ to have failed to give effects to the original judgment (after a procedure on the basis of Article 260(2) TFEU), the same reasoning should again be applied and the effect of that second judgment should be limited in time.

---

580 It was argued higher that it is unlikely that such an argument could convincingly be used to argue a violation of Article 4(3) TEU. Nevertheless, such a violation will be presumed here by way of an example to better explain the possible consequences of a violation of Article 4(3) TEU.

581 See, *e.g.*, ECJ, Joined Cases 314-316/81 and 83/82 *Waterkeyn* [1982] E.C.R. 4337, para. 14.

582 See, *e.g.*, ECJ, Case C-35/97 *Commission v France* [1998] E.C.R. I-5325, para. 50.

583 See the detailed discussion under V.C.2., *supra*.

584 This results from the fact that Directive 2004/38 does not apply in "purely internal situations"; see ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 76-78.

585 See also n. 461, *supra* and accompanying text.

586 See on Article 8 EHRM, *e.g.*, ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279; ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607.

587 See the detailed discussion under V.C.5., *supra*.

588 See the detailed discussion under V.C.3., *supra*.

589 See *e.g.* ECJ, Case C-35/97 *Commission v France* [1998] E.C.R. I-5325, para. 49; ECJ, Case C-426/98 *Commission v Greece* [2002] E.C.R., para. 42.

It must be remarked that in practice this situation might not arise at all. If one of the Member States were to adopt a nationality law suddenly extending its nationality to large numbers of non-nationals, the Commission or one of the other Member States would likely respond immediately. They could ask for interim measures on the basis of Article 279 TFEU in order to obtain the suspension of the contested nationality legislation.[590] In order to obtain this, they would have to establish a *prima facie* case, and establish that the application is urgent.[591] The second criterion might be easily satisfied, because it is clear from what we said previously that it will often not be possible to annul all the effects of the contested legislation at a later stage. If the application for interim measures succeeds, the issue of violations of fundamental rights or infringement of the principle of legitimate expectations or the principle of proportionality will obviously not arise.

Besides, it must be pointed out that not every finding that a Member State's provision regarding acquisition of nationality is in breach of Union law will necessitate a change which would have for a consequence that past acquisitions of nationality on the basis of this provision have become invalid. It is well possible that the contested provisions employ a criterion which is in violation of Union law. One example would be a racist criterion at odds with the fundamental right to equal treatment. If this criterion is severable from the rest of the provision, the Member State would only have to delete the criterion from the provision. The provision would not have to be abrogated in its entirety and, hence, nationality measures adopted on the basis of it in the past would not have become invalid.

In the second place, the infringement action can be directed at an *individual measure* conferring the nationality of the Member State in question on a given person. Suppose the ECJ were to find this conferral of nationality to be in violation of Article 4(3) TEU, because it was done in a way that deceived or misled other Member States.[592] Such a judgment would again normally require the Member State in question to withdraw its nationality. Again, however, such withdrawal might hurt some of the most fundamental principles of Union law such as the principle of proportionality. It is submitted that in such a case an infringement action can generally only be directed against a general piece of nationality legislation and not against an individual measure conferring nationality. At the same time, it must be stressed that the annulment of an individual measure conferring nationality will not automatically hurt one of these principles. Such will not automatically be the case, for instance, where nationality was obtained by fraud or deceit.[593]

2. Loss of Member State nationality

---

590 Compare: ECJ (order of the President of 25 October 1985), Case 293/85 R *Commission v Austria* [1985] E.C.R. 3521; ECJ (order of the President of 2 October 2003), Case C-320/03 R *Commission v Austria* [2003] E.C.R. I-11665.

591 Lenaerts, Arts and Maselis (Bray (ed.)), *Procedural Law of the European Union* (2nd ed.) (London, Sweet & Maxwell, 2006), 433.

592 Again, this scenario does probably not square with the actual meaning to be given to Article 4(3) TEU (see under V.B.3., *supra*), but again it is useful to consider this by way of an example.

593 See the discussion of the *Rottmann* case, *supra*, and Article 7 of the European Convention on Nationality, stating that "A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases:…(b) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant…".

Once we accept that the limitations described above can serve in one way or another to limit, under Union law, the competences of the Member States to lay down rules concerning loss of nationality and to withdraw their nationality, the next question becomes: what are the consequences if a Member State exercises this competence in disregard of the said limitations?

The main consequence of the adoption of a measure in conflict with Union law is that the Member State concerned will have to change its legislation to bring it in conformity with Union law and, as long as such has not happened, Member State authorities, including national courts, are under a duty to refrain from applying the conflicting measure.[594] Concretely this means that the competent authorities[595] should refrain from adopting a decision withdrawing nationality on the basis of the Member State's nationality law where such a decision would infringe the limitations discussed above. Under such circumstances, they should leave the Member State's nationality law unapplied, with the result that the persons concerned keep their nationality, and hence the status of Union citizenship. Should a decision withdrawing nationality in breach of Union law nevertheless be adopted, then the consequences under Union law are less straightforward.

It could be argued that Member State authorities, including those from other Member States are under a duty to refuse to give effect to the withdrawal in breach of Union law and must continue to treat the person concerned as a national of the Member State concerned, and thus as a Union citizen (see Article 20(1) TFEU). The consequence would be that the person concerned preserves his status of Union citizenship and the rights attached to this status, in all Member States, including his own Member State. This point of view effectively makes a distinction between the effects of withdrawal of Member State nationality on the domestic level, on the one hand, and on the level of Union law, on the other hand. Hall[596] has pointed out that one could argue that the measure withdrawing nationality might, despite the limitations deriving from Union law, well be valid under the domestic law of the Member State concerned. The consequence of this would be that the person in question no longer has the nationality of that Member State. However, because the withdrawal does not produce any effects at the level of Union law, he or she should still be considered as having the nationality of the Member State in question for the purposes of Union citizenship. Hence, he or she would keep this Union citizen status, and be entitled to all the rights attached to this status, even in his own (former) Member State. Indeed, that Member State could not consider the situation in question as purely internal, because it involves the citizenship rights of a person who is no longer a national of that Member State.

This point of view, holding that withdrawal of nationality may be effective without thereby affecting a person's Union citizenship status, is in accordance with the outcome of the staff cases mentioned above. In those cases, in *Airola*[597] more specifically, the ECJ was prepared to refuse to give effect to a conferral of nationality at the level of Union law, *i.e.* for the purposes of the application of the Staff Regulation. At the same time it did not seem to call into question the validity of that conferral under the domestic law of the Member State

---

594 See ECJ, Case 48/71 *Commission* v. *Italy* [1972] E.C.R. 529, paras 6-8; ECJ, Case 106/77 *Simmenthal ("Simmenthal II")* [1978] E.C.R. 629, para. 21. See on this subject: Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 753 *et seq.*

595 Such as, for instance, administrative bodies, see *e.g.* ECJ, Case 103/88 *Fratelli Constanzo* [1989] E.C.R. 1839, para. 31.

596 Hall, "Loss of Union Citizenship in Breach of Fundamental Rights" (1996) 21 *E.L. Rev.*, 141.

597 ECJ, Case 21/74 *Airola* [1975] E.C.R. 221.

concerned. Such corresponds, furthermore, to the traditional position under international law. As explained above, nationality in principle has two aspects, both a national and an international one, which should be distinguished.[598] As a result, a loss or acquisition of nationality may be perfectly valid under the domestic law of a State without however producing the corresponding effects under international law.[599] The point of view may find further support in a strand in the case law of the ECJ holding that national provisions conflicting with Union law continue to be effective for those aspects which the Union provisions have left unaffected.[600] One could argue that the competence of the Member States regarding nationality has, because of the introduction of Union citizenship, come within the scope of Union law, but only insofar as it relates to Union citizenship. This point of view admits that Union law attaches important consequences to a decision withdrawing Member State nationality, namely loss of the status of Union citizenship and of all the rights attached to it. At the same time it stresses that Union law has never pretended to directly regulate Member State nationality. Therefore it considers that a decision withdrawing nationality may be invalid under Union law only to the extent that it entails the loss of Union citizenship, and has to be disregarded only to that extent. The end result is that the person concerned, despite losing his Member State nationality, should still be considered a Union citizen.

However, the point of view just set out is problematic for a number of reasons. First of all, it seems to be in conflict with the express wording of Article 20(1) TFEU, stating: "Every person holding the nationality of a Member State shall be a citizen of the Union". As I argued higher, this provision should be interpreted that a person who does not have the nationality of a Member State, in accordance with the laws of that Member State, is not a Union citizen. Accordingly, the view set out above, holding that a person not holding the nationality of a Member Stat is a Union citizen seems to be contrary to primary Union law. Secondly, it potentially causes enormous practical problems. As Hall explains,[601] when someone's nationality is withdrawn in violation of Union law, the denationalised Union citizen will, in his former Member State, effectively be assimilated to a Union citizen possessing the nationality of another Member State. This means in turn that he will be liable to expulsion or exclusion in certain circumstances (for example, public policy, public security, public health, or failure to meet requirements as to financial self-sufficiency or health insurance[602]). However, since this person potentially lacks the nationality of any of the Member States, every Member State could expel him or refuse him access to its territory on these grounds. This could lead to an absurd spectacle of an endless shuffle between Member States. Such is clearly not in accordance with the aims and purposes of Union citizenship. Thirdly, the point of view seems to conflict with the duty on part of the Member States to unconditionally recognise nationality measures adopted by another Member State. Higher I argued that this duty, articulated by the ECJ in *Micheletti* in relation to acquisition of nationality, should also apply in cases of loss of nationality. Accordingly, it would seem to be the case that where one

---

598 *Supra*, under II.

599 See, in this connection, the examples cited by Grossman, "Birthright Citizenship as Nationality of Convenience" (2004) *Proceedings, Council of Europe, Third Conference on Nationality, Strasbourg, 11-12 Oct. 2004*, 112.

600 See *e.g.* ECJ, Case 40/69 *Hauptzollamt Hamburg* v. *Bollmann* [1970] E.C.R. 69, paras 4-5; ECJ, Case 50/76 *Amsterdam Bulb* [1977] E.C.R. 137, paras 9-30; ECJ, Case 111/76 *Van den Hazel* [1977] E.C.R. 901, paras 13-27; ECJ, Case 255/86 *Commission* v. *Belgium* [1988] E.C.R. 693, paras 8-11; ECJ, Case 60/86 *Commission* v. *United Kingdom* [1988] E.C.R. 3921, para. 11; ECJ, Case 190/87 *Moorman* [1988] E.C.R. 4689, paras 11-13.

601 Hall, "Loss of Union Citizenship in Breach of Fundamental Rights" (1996) 21 *E.L. Rev.*, 141.

602 See the relevant provisions of Directive 2004/38.

Member State withdraws its nationality from a person, even in breach of Union law, other Member States have to recognise this decision and can no longer treat the person concerned as a Union citizen, although they can to some extent accord him the rights associated with that status under their national law. Admittedly, one could point out that the *ratio decidendi* for establishing a duty of unconditional recognition does not apply with full force here. Indeed, as explained higher, that principle serves to safeguard at the Union level the principled competence of the Member States to regulate nationality. However, one could argue that this competence should not be protected by Union law where it is exercised in breach of Union law. Nevertheless, in these circumstances, part of the *rationale* for recognising a duty of unconditional recognition of withdrawal of nationality still holds good, namely the fact that, in the absence of such a duty, the rights of the individual concerned under Union law would vary from one Member State to another. Indeed, in the absence of a duty of unconditional recognition, some Member State authorities might consider the withdrawal measure to be valid under Union law or refuse to act in accordance with their duty to refuse to give it effect, whereas other Member States would refuse to recognise the withdrawal measure as valid and continue to consider the person as a Union citizen. Such a situation would run counter to the Union's objectives of establishing an internal market and a Citizens' Europe.

It is submitted, therefore, that the correct view is that, where a Member State enacts nationality legislation in violation of Union law, this measure should be disregarded by all Member States' authorities in its entirety. As a consequence, the persons concerned will not lose their Member State nationality or their status of Union citizenship. This result flows naturally from the primacy of Union law. However, where this legislation is implemented by the national authorities and a person's nationality is withdrawn in a way that violates Union law, the person can no longer be considered as a Union citizen and loses this status and the associated rights under Union law. *De lege ferenda* there is much to be said for severing the status of Union citizenship and that of Member State nationality, certainly in case of loss of Member State nationality in a way that violates Union law. That would probably necessitate an amendment of the Treaty framework surrounding Union citizenship.[603]

Union law limitations to the Member States' competence regarding loss of nationality can be enforced before the Union Courts in much the same way as Union law limitations to their competence regarding acquisition of nationality. Here too, a Member State found to be acting in breach of Union law will be required to take away the past effects of the measure in breach of Union law.[604] Accordingly, the Member State in question should re-establish the nationality of persons whose nationality it had withdrawn in breach of Union law. To the difference of the situation described above under "acquisition of nationality", such will not normally have serious negative consequences for the individuals concerned.

3. Refusal of Member State nationality

The last issue to determine are the consequences under Union law where a Member State refuses its nationality to a person by applying criteria which violate Union law. I refer to the

---

603 As was observed by by AG Poiares Maduro (Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 34, footnote 42). The AG referred to Kochenov, "A Glance at State Nationality/EU Citizenship Interaction (Using the Requirement to Renounce One's Community Nationality upon Naturalising in the Member State of Residence as a Pretext)" (2009) *11th bi-annual EUSA Conference*. See also the discussion under VI., *infra*.

604 See *e.g.* ECJ, Case C-35/97 *Commission v France* [1998] E.C.R. I-5325, para. 50.

example given higher of a certain Member State changing its existing nationality legislation by adding a criterion which is clearly racist in nature.[605] As explained higher, in such circumstances, the Member State concerned would be under a duty to change its legislation in order to bring it in accordance with Union law, and the competent national authorities should leave the contested provision or criterion unapplied. If they do however apply the contested provision and, on the basis thereof, refuse to grant the nationality of the Member State concerned to an individual because he does not satisfy the criterion which is racist in nature, it is beyond doubt that the persons concerned would not acquire Union citizenship, except in those cases where they would acquire the nationality of another State. The persons concerned would remain third country nationals and not be able to claim their citizenship rights in the different Member States.

It could be argued that other Member States would be under a duty to refuse to recognise the refusal decision in breach of Union law, on grounds similar to the ones explained above in relation to loss or withdrawal of nationality in breach of Union law. This would have as a result that the person who was refused the nationality of a Member State for reasons not compatible with Union law would in other Member States be considered as a Union citizen. This, however, would run counter to the same objections as stated higher with regard to loss of nationality. In particular the situation described would be in contradiction with Article 20(1) TFEU. It would, moreover, lead to a different application of the Union citizenship provisions, with some Member States recognising the person concerned as a Union citizen but others not, and cause enormous practical difficulties, as described higher. Besides, it would not be in accordance with the duty to unconditionally recognise nationality decisions taken by another Member State and thereby, arguably, undermine the Member State's principled competence regarding nationality, although it could again be argued that Union law should not protect this competence where it is exercised in a way that violates Union law. More fundamentally, the view set out would attribute Union citizenship even to persons who have never held the nationality of one of the Member States. As such would pave the way for a concept of Union citizenship which is completely independent from Member State nationality. This is, as I have explained higher, not compatible with the current Treaty framework, although future developments along these lines cannot be excluded.

The contested legislation, containing criteria for acquisition of nationalities and measures adopted thereunder could, as explained higher, be challenged before the Union Courts and this could, eventually, oblige the Member State concerned to delete the contested criteria or condition from its legislation. Furthermore, a Member State found to be acting in breach of Union law will not only be required to change its legislation for the future; it will also be required to take away the past effects of the measure in breach of Union law.[606] This would seem to entail an obligation for that Member State to retroactively grant its nationality to those persons whom had been refused this nationality on grounds of the provision found to be in breach of Union law. To the difference of the consequences described higher where a nationality was acquired on grounds of provisions or criteria in breach of Union law, such will not normally have serious negative consequences for the individuals concerned.

---

605 Take the hypothetical example of a nationality codes that requires that, in order to acquire the nationality of that State, one must, *inter alia*: "belong to the Caucasian race" or "be Christian". Inspiration from historical precedents can be found in the early US statutes on naturalization (see on this legislation, for instance, the famous Supreme Court case *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923) and the discussion thereof in Snow, "The Civilization of White Men: The Race of the Hindu in *United States v. Bhagat Singh Thind*, in H. Goldschmidt and E. McAlister *Race* (eds)*, Nation, and Religion in the Americas* (Oxford and New York, Oxford University Press, 2004), 259-280).

606 See *e.g.* ECJ, Case C-35/97 *Commission v France* [1998] E.C.R. I-5325, para. 50.

VI CONCLUSION

This chapter has analysed in some detail the legal regime surrounding determination of the personal scope of Union citizenship. I have set out how, under general international law, States have the sovereign competence to regulate nationality, although the effects of the exercise of this competence on the international level may be limited by certain principles deriving from international law. Furthermore, it was explained that the introduction in the Treaties of the chapter on Union citizenship did not change the principled competence of the Member States to regulate nationality. The choice of the Member States to define Union citizenship with reference to Member State nationality, together with the clear affirmation in a declaration attached to the Treaties and a statement by the Heads of State or Government that Member State nationality is to be determined by the national law of each Member State only, is such as to ensure that Member States remain competent to regulate nationality and thereby determine the personal scope of Union citizenship. This finds further confirmation in the practice of the Union institutions and the case law of the Union courts. Member States may even establish a special type of nationality definition for the purposes of Union citizenship, by submitting a declaration to that effect.

Despite the fact that the Member States are competent to regulate nationality, Union law will influence this competence in two ways. In the first place, Union law may have a rather "indirect" influence on the competence of the Member States in the field of nationality. The coupling of Member State nationality and Union citizenship, together with the duty for Member States to unconditionally recognize decisions regarding nationality taken by another Member State, sets in motion a subtle interplay between the Member States, whereby rules and practices regarding nationality in one Member State may have significant consequences for other Member States. This may lead to political pressure on certain Member States to change their nationality rules with regard to loss or acquisition of nationality. The clearest example of such change until now is the change of the Irish nationality legislation in 2004. Similar mechanisms of indirect pressure by the Member States and the Union institutions may well lead to changes in the near future in the nationality laws and practice of Spain, on the one hand, and Estonia and Latvia, on the other hand.

In the second place, Union law, through the provisions on Union citizenship, also places direct limitations to the Member States' competence regarding nationality. The existence of such limitations has long been argued in legal literature and has now been confirmed by the ECJ in its seminal *Rottmann* judgment of March 2010. The judgment confirms the principled competence of the Member States to regulate nationality, but clarifies at the same time that this competence must be exercised "having due regard to Union law" in situations falling within the field of Union law. Accordingly, the competence regarding nationality is no different from other Member State competences in the sense that it cannot be exercised with entire disregard of Union law and that compliance with Union law can be tested by the courts to the extent that situations falling within the scope of application of Union law are concerned. However, this chapter has put forward the view that that the competence regarding nationality is different from most other Member State competences as far as the required link with Union law is concerned in order for a situation to fall within the scope of Union law. I have argued that the intrinsic link between Member State nationality and Union citizenship can in itself provide a sufficient link with Union law. Accordingly, every rule or decision concerning acquisition, refusal or loss of nationality should arguably be considered

as presenting a sufficient link with Union law where it entails the acquisition, refusal or loss of Union citizenship – even in the absence of any further cross-border dimension. In this sense, the competence regarding nationality can be said to be a "cas spécial", which is warranted by the fact that the exercise of this competence determines the personal scope of Union citizenship. All this in no way takes away the competence of the Member State to lay down rules on the acquisition and loss of nationality. It only implies that Member States must, when exercising this competence, take into account certain rules or principles of Union law.

This chapter has discussed five Union law rules or principles which could act as meaningful limitations to the competence of the Member States to regulate nationality. The principle of proportionality is the only limitation until now which has as such been recognised by the ECJ. Other rules or principles of Union law that could be relevant in this regard are the right to free movement of Union citizens, the duty to respect fundamental rights – in particular the right to equal treatment, the right to nationality and the right to respect for family life –, the principle of sincere cooperation and the principle of legitimate expectations. Some of these limitations are particularly relevant with regard to the Member States' competence regarding acquisition of nationality, including refusal of nationality, whereas others will be more relevant to rules on loss of nationality, and still others to both of them. The consequence of the existence of these limitations is that Member States will be required to take them into account when laying down rules on acquisition and loss of nationality and when implementing these rules. Where a Member State adopts a measure that violates one or more of the said limitations, the measure concerned will be fully effective under Union law and any resulting acquisition, refusal or loss of Union citizenship will have to be fully accepted by the other Member States. At the same time, the Member State concerned will be under a duty to bring its legislation or practice in accordance with Union law and, where necessary, this duty can be enforced before the Union Courts.

It is to be expected that future guidance concerning Union law limitations and their consequences will be provided first and foremost by the case law of the ECJ. As in other fields where Union citizenship triggers a duty for the Member States to exercise their competence with due regard to Union law, the Court plays a pioneering role in determining the scope and meaning of this duty. The other Union institutions would seem to have less of a role to play, since at present the Union is not competent to lay down rules concerning nationality. However, future developments may changes this situation. Given the growing importance of Union citizenship for the functioning of the Union legal order and given the progressive acceptance of the fact that Union law is applicable in the field of nationality to the extent that it determines the personal scope of Union citizenship, it could be argued that in the future the Union must be given direct competence to regulate Union citizenship. Such development could be defended on grounds of the need for the Union to safeguard the *effet utile* of Union citizenship. Such is, as I have explained in this chapter, not possible under the present Treaty framework and would require an amendment of the Treaties. Two possible developments can be imagined which would increase the Union's competence to determine the personal scope of Union citizenship.

On the one hand, the Union legislator could be given competence to adopt minimum rules for the acquisition and loss of nationality.[607] Such would lead to a (partial) harmonisation of the

[607] This possibility is regularly flagged or discussed in legal literature. See, for instance, Margiotta and Vonk, "Nationality Law and European Citizenship: the Role of Dual Nationality" (2010) *EUDO Citizenship Working Paper, available at* http://eudo-citizenship.eu/docs/RSCAS%202010_66.pdf, at p 16-20; De

Member States' nationality laws. In this connection, it is sometimes argued that the growing competences of the Union in the field of immigration should entail the competence of the Union to regulate aspects of nationality law.[608] Nationality and (long-term) immigration are clearly interlinked because the right to nationality is typically conferred on third country nationals who have legally entered the Union and continue to legally reside there. Historically speaking, similar considerations relating to the need to pursue an effective immigration policy have led in the United State to a transfer of the competence to regulate the acquisition and loss of nationality from the individual States to the federal level.[609] Accordingly, it is sometimes argued that the Union should be given competence to harmonise the conditions for acquisition of nationality by long term resident third country nationals. This would have for a logical consequence that the Union would become competent to directly regulate the personal scope of Union citizenship to some extent.

It is clear that this suggestion would need an amendment of the Treaties. Current Article 79(2)a) TFEU, for instance, which grants the power to define "the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States", does not amount to a right for the Union to regulate nationality.[610] As I have explained above, nationality is not merely a right, but a status or a "right to have rights"[611] and does not, therefore, fall under that provision. The competence to regulate nationality can neither be based on Article 20(2)(a) TFEU in combination with Article 77(3) TFEU. Those Treaty provisions, which allow the Union under certain conditions to adopt provisions concerning "passports, identity cards, residence permits or any other such document", are limited to facilitating free movement. Given the absence of any specific Treaty provision conferring the competence to regulate nationality, a possible legal basis would *prima facie* seem to be Article 352 TFEU (the so-called "flexibility clause"). However, in my view, it is not possible to consider the (minimum) harmonisation of the Member States' nationality laws as being "necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties".[612] Admittedly, the adoption of minimum rules concerning Member State nationality could enhance the Union's migration policy and bolster the status of Union citizenship in certain circumstances, but can hardly be said to be necessary to attain the Union's objectives in those fields.

Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF; Hansen and Weil, "Introduction: Citizenship, Immigration and Nationality: Towards a Convergence in Europe?", in *Towards a European Nationality: Citizenship, Immigration and Nationality Law in the EU*, (Basingstoke, Palgrave, 2001); Nascimbene, "Towards a European Law on Citizenship and Nationality?", in S. O'Leary and T. Tiilikainen, Citizenship and Nationality Status in the New Europe (London, Institute for Public Policy Research, 1998).

608 See, among others, Kotalakidis *Von der nationalen Staatsangehörigkeit zur Unionsbürgerschaft: die Person und das Gemeinwesen* (Baden-Baden, Nomos, 2000), 316.

609 See De Groot, "The Relationship between the Nationality of the Member States of the European Union and European Citizenship", in La Torre (ed.), *European Citizenship: An Institutional Challenge* (The Hague, Kluwer Law International, 1998), 116.

610 Hailbronner, "Nationality in public international law and European law", in R. Bauböck, E. Ersbøll, K. Groenendijk and H. Waldrauch (eds.), *Acquisition and loss of nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses*, (Amsterdam, Amsterdam University Press, 2006) 35, at 100.

611 This conception of nationality as a "right to have rights" is often cited in legal literature and stems from Hanna Arendt's work. See the discussion in Oman "Hannah Arendt's 'Right to Have Rights': A Philosophical Context for Human Security" (2010) *Journal of Human Rights*, 279-302.

612 On this point I agree with Jessurun d'Oliveira (Jessurun d'Oliveira, "Case C-369/90 *Micheletti and others*" (1993) 30 *CML Rev.*, 637).

In any event, the adoption of binding Union rules concerning Member State nationality, even minimum rules, does not seem a realistic option in the near future, given the fact that it would seem to be impossible to muster a sufficient majority in the Council in view of the fact that Member States are still very reluctant to concede any competence in that area to the Union. A more realistic option would seem to be the adoption of non-binding rules or principles concerning nationality, by which the Member States would voluntarily bring their nationality legislation in accordance with certain Union standards. This would have the benefit of clarifying certain Union principles that must be taken into account by the Member States and would thereby foster the *effet utile* of Union citizenship, without however resulting in a (perceived) impingement on the sovereign powers of the Member States. Obviously, the effectiveness of non-binding rules would fully depend on the willingness of the Member States to comply with them. The well-known "Open Method of Coordination" in particular could be a fruitful option for coordinating the Member States' nationality laws to some extent.[613] Besides, the Union institutions could issue non-binding resolutions or recommendations concerning the Member States' nationality legislation.[614]

On the other hand, it would be possible to partially or entirely decouple Union citizenship and Member State nationality and establish an independent "citizenship of the Union".[615] Accordingly, a type of independent "European nationality" would be established. Such would clearly require a substantial amendment of the Treaties, as the current Treaty framework is predicated on the fact the Union does not have a form of autonomous or self-standing citizenship. More specifically, the definition of Union citizenship in Article 20(1) TFEU would have to be changed, and the reference to "the nationality of a Member State" would have to be replaced by a reference to criteria or conditions of Union law. The most common suggestion for an alternative definition is that of making the acquisition of Union citizenship dependent on a certain period of residence.[616] This would bring uniformity to the conditions for acquisition of Union citizenship and prevent Member States from hindering access to Union citizenship in a way that violates Union law. For this reason, it would foster

---

613 See the discussion in Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2007) *Tul. Eur. & Civ. L.F.*, 104-113. On the Open Method of Coordination in general, see Senden and Tahtah, "Reguleringsintensiteit en regelgevingsinstrumentarium in het Europees Gemeenschapsrecht. Over de relatie tussen wetgeving, soft law en de open methode van coördinatie" (2008) *SEW*, 43-57; Benz, "Accountable multilevel governance by the open method of coordination?" (2007) 13 *E.L.J.,* 505-522; Szyszczak, "Experimental governance: the open method of coordination" (2006) 12 *E.L.J.*, 486-502.

614 In the past, the European Parliament issued several resolutions concerning nationality law. See, *for instance*, Resolution of the European Parliament of 20 January 1984 in the matter of passing on nationality, [1984] O.J. C46/146.

615 See the discussion in Kochenov, "Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship" (2010) *EUI RSCAS Paper 2010/23, available at* http://cadmus.eui.eu/dspace/bitstream/1814/13634/1/RSCAS_2010_23.pdf, 29 *et seq.*

616 See, *inter alia*, Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2007) *Tul. Eur. & Civ. L.F.*, 141 *et seq.*; Garot, "A new basis for European citizenship: residence?', in M. La Torre (ed.), *European Citizenship: An Institutional Challenge*, (The Hague, Kluwer Law International, 1998), 235-258. See already the suggestions by Evans, "Nationality Law and European Integration" (1991) 16 *E.L. Rev.*, 214-215. See also the interesting observations by Davies on the diminishing importance of Member State nationality and the growing importance of residence in the context of the EU: Davies, "'Any Place I Hang My Hat?' or: Residence is the New Nationality" (2005) 11 *E.L.J.*, 43-56. Report drawn up by MEP Catania: Report on the Commission's Fourth report on Citizenship of the Union (1 May 2001 – 30 April 2004) (2005/2060(INI)). The Report "[t]akes the view that EU citizenship based on residence should be the ultimate goal of the dynamic process which will make the European Union a genuine political community". The final Report did not, however, pass the vote in the Europea Parliament. See the discussion in Maas *Creating European Citizens* (Lanham, Rowman & Littlefield, 2007), 98-100.

integration of third country nationals resident in the Union. However, these advantages would come at a large cost for the Member States, since the said change would take away their power to determine the personal scope of Union citizenship and considerably reduce the importance of Member State nationality as a legal status.[617] For this reason, it seems clear that such a far-reaching change is politically undesirable and is very unlikely to happen in the near future.

A more limited decoupling of Union citizenship and Member State nationality is advocated by some legal scholars. Kostakopoulou, in particular, has argued that the effects of Union citizenship should be preserved where the nationality of the person concerned is withdrawn in violation of Union law.[618] This approach would not change the definition of Union citizenship or change the fact that Member States autonomously regulate nationality, although subject to certain Union law limitations as far as situations falling within the sphere of Union law are concerned. The crucial difference with the existing situation would lie in the consequences attached to these limitations. If Kostakopoulou's point of view were accepted, Union citizenship, once acquired, would not be lost by national decisions in breach of Union law. Even though this view would be beneficial for safeguarding the full effectiveness of Union citizenship, I am of the opinion that it can not be adhered to, for reasons explained higher (see under IV.D., *supra*). In particular, it would not be compatible with the meaning of Article 20(1) TFEU as it was intended by the masters of the Treaties and it could entail significant practical problems. Nevertheless, it must be acknowledged that it poses far less of threat to the Member States' sovereign powers.

At the end of the day, much depends on what conception of Union citizenship is desired.[619] More uniformity in the determination of the personal scope of Union citizenship might bolster its potential, but the Union must be cautious not to overemphasize uniformity to the disadvantage of diversity.[620] The Union must, in line with new Article 4(2) TEU, be careful to give due respect to the Member States' competence regarding nationality[621] and be true to the Treaty definition of Union citizenship as a complementary status to Member State nationality rather than a self-standing legal status. The Member States, for their part, must

---

617 See, in this conncection the analysis in Davies, "'Any Place I Hang My Hat?' or: Residence is the New Nationality" (2005) 11 *E.L.J.*, 43-56.

618 See, *inter alia*, Kostakopoulou, "European Union citizenship and Member State nationality: updating or upgrading the link?" (2010) *EUDO citizenship forum, available at* http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=5; Kostakopoulou, "The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions", in de Witte and Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (2011), ; Kostakopoulou, "European Union Citizenship: the Journey goes on ", in Ott and Vos (eds.), *Fifty Years of European Integration* (The Hague, T.M.C. Asser Press, 2009), 271-290.

619 See the very interesting discussion by Bauböck , who approaches the issue from three perspectives: a statist approach, a unionist approach and a pluralist approach (Bauböck, "Why European Citizenship? Normative Approaches to Supranational Union", (2007) *Theoretical Inquiries in Law,* 481-487).

620 For this rather normative-philosophical issue, see the discussion in Barber, "Citizenship, Nationalism and the European Union" (2002) 27 *E.L. Rev.,* 241-259; Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (The Hague, Kluwer Law International, 2002), 93 *et seq.*; Weiler, "To be a European Citizen- Eros and Civilization" (1997) 4 *Journal of European Public Policy,* 495-519.

621 See Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration" (2011) 17 *E.L.J.*, 33. An interesting parallel can be drawn with the Member States' competence to lay down rules concerning names. In *Sayn-Wittgenstein*, the ECJ accepted that a rule concerning surnames which hindered the exercise of the free movement of Union citizens could be justified and thereby it referred *inter alia* to Article 4(2) TEU (ECJ, Case C-208/09 *Sayn-Wittgenstein* [2011] E.C.R. nyr).

assume the consequences of their membership of the Union for the exercise of their competences and give full effect to the provisions on Union citizenship. For the foreseeable future, the ECJ seems to have indicated the way forward in its *Rottmann* case. The competence to regulate nationality rests firmly with the Member States, but in order to safeguard the potential of Union citizenship, they must take into account certain Union law limitations when exercising this competence. It can be expected that the meaning and extent of these limitations will be further clarified in the near future. The ECJ and, perhaps, non-binding Union law instruments will play a pivotal role in this development.

CHAPTER 3 OCTS AND UNION CITIZENSHIP

I INTRODUCTION

This chapter will look into the particular case of citizens of the so-called "Overseas Countries and Territories" associated with the Union (hereinafter*:* "OCTs").[1] OCTs are parts of the territories of Union Member States with a special status. Without wanting to pre-empt the detailed discussion below, it is important to immediately stress two key points in relation to them. On the one hand, they are not fully part of the EU, and the Treaties *prima facie* only apply to them in a limited way (see Article 355(2) TFEU). On the other hand, they are far from being fully extraneous to the EU, since important parts of the Union *acquis*[2] are applicable to them. Indeed, a specific part of the Treaties is even devoted to them ("Part Four of the TFEU: "Association of the Overseas Countries and Territories"). This chapter will inquire into what the legal consequences of this special status could be with regard to the concept of Union citizenship. More specifically, I want to inquire into whether citizens of the OCTs are Union citizens and to what extent they enjoy the rights associated with that status. This analysis will at the same time allow me to inquire into the extent to which the provisions on Union citizenship have a concrete impact on the policies of the Member States with regard to their nationals resident on or having a particular connection with one of their OCTs.

When embarking on this analysis, one is immediately faced with an important hurdle: the different Member States having overseas possessions apply varying rules to the countries and regions in question. As a consequence, they will have a different status, not just under domestic law, but also under international and Union law. To analyse the specific status of OCTs, in the sense of Article 355(2) TFEU, it is important to first determine precisely which of the overseas possessions qualify for this status. The said analysis can only start therefore with an overview of the constitutional structure of these Member States, focussing on their overseas possessions. Moreover, such analysis will allow me to reach a first conclusion as to the applicability of Union law to these territories, an aspect that will turn out to be vital when discussing the citizenship rights of OCT citizens, as will be explained below.

---

1 See Part Four of the TFEU. The "Overseas Countries and Territories" are referred to as "landen en gebieden overzee (LGO)" in Dutch; "pays et territoires d'outre-mer (PTOM)" in French; "überseeischen Länder und Hoheitsgebiete" in German and "países y territorios de ultramar" in Spanish. For a list of OCTS, see the list in Annex II to the Treaties – Overseas countries and territories to which the provisions of Part Four of the Treaty on the Functioning of the European Union apply, [2010] C83/334 (see, before the entry into force of the Lisbon Treaty: Annex II to the Treaty establishing the European Community - Overseas countries and territories to which the provisions of Part Four of the Treaty apply, [2006] O.J. C321E/186.

2 I will, generally speaking, avoid using the well-known term "*acquis* communautaire", since it is no longer accurate after the entry into force of the Lisbon Treaty (which replaced the EC by the "new" EU, which is broader in scope) and, perhaps, no longer terminologically correct (since the EC has ceased to exist). The term should therefore only be used for references to the historical *acquis* as it existed before the entry into force of the Lisbon Treaty.

The finding of a diverse status applies not only to the overseas possessions themselves, but also to their population. The Member States in question have vastly differing nationality legislation in place with regard to the citizens of their overseas possessions. Some Member States have a system of one single nationality, held by both their citizens in mainland Europe and the citizens in their overseas possessions. Other Member States, notably the UK, have different categories of nationality, and confer on the citizens of their overseas possession not necessarily the same status as on their citizens in mainland Europe. It is of crucial importance for my analysis in this chapter to study these different nationality laws in some detail. Indeed, as has become clear from the previous chapter, the personal scope of Union citizenship is determined first and foremost by the nationality laws of the Member States. The status of citizens of the OCTs under Union law cannot be determined, therefore, without studying the nationality laws of the Member States concerned.

The determination of the application of Union law and the provisions on Union citizenship in particular, to the OCTs and their inhabitants, will enable me to analyse to what extent citizens of the OCTs enjoy the rights associated with the status of Union citizenship. The reason is that these rights always have a territorial scope and a personal scope of application, which need always be conceptually distinguished. One could imagine – merely to illustrate the point – that some citizenship rights can be exercised in the OCTS, but that OCT nationals do not belong to the beneficiaries of these rights. Conversely, one could imagine a situation in which OCT nationals would be the beneficiaries of certain rights, but could only exercise these rights in the "European territory" of the EU Member States. This distinction between personal and territorial scope of the citizenship provisions will be vital in the analysis of the rights of OCT nationals. Below, I will concentrate my analysis on two of the rights associated with the status of Union citizenship: the right of free movement and residence, on the one hand, and the right to vote and stand as a candidate in elections to the European Parliament and municipal elections, on the other hand.

The structure of this chapter will be as follows. First, an overview will be given of the constitutional structure of the four Member States possessing OCTs and the applicability of the Treaties with regard to their OCTs (II.A.). This will be followed by an analysis for each of these four Member States of the nationality provisions in place, in particular with regard to citizens of the OCTs (II.B.). Next, a detailed analysis will be given of the precise relation between the provisions on Union citizenship and the OCTs, first in general (III.A.) and next more specifically with regard to the free movement rights (III.B) and electoral rights (III.C.) enjoyed by Union citizens.

II OVERVIEW

A. Constitutional structure and applicability of the Treaties

The following overview will discuss the status under Union law of the different overseas possessions of four Member States: the Kingdom of the Netherlands, France, Denmark and the United Kingdom. I will try to precisely determine to what extent Union law is applicable to them. The focus thereby will be on those countries and territories qualifying for the status of "OCT".

As a general point, it must be noted that there is a significant degree of flexibility in the geographical scope of Union law, a phenomenon that has been termed "l'Europe à géométrie variable".[3] Contrary to what one may think,[4] Union law does not invariably apply to all areas which are under the sovereignty or within the jurisdiction of the Member States. Some of the overseas possessions fall fully outside the scope of Union law, whereas Union law is almost fully applicable to others. The most important distinction in this regard is that between "outermost regions", on the one hand, and OCTs, on the other hand.

Union law applies in full to outermost regions,[5] but derogations may apply to take account of their

> "structural social and economic situation […], which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development."[6]

The Treaties provide that the Council can adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including

---

3 Ziller, "Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories", in De Búrca and Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?* (Oxford and Portland, Hart Publishing, 2000), 113.

4 Article 52(1) TEU explicitly states that it applies to the different Member States, which it enlists. Article 52(2) TEU refers, however, to the specific arrangements laid down in Article 355 TFEU. For the EAEC Treaty, see Article 198 TEAEC. Before the entry into force of the Lisbon Treaty, the TEC explicitly declared that it was applicable to all the Member States (Article 299 TEC). The TEU contained no such express reference, but determined its territorial scope in a similar but implicit way by employing the expression "Member States".

5 "ultraperifere gebieden (UPG)" in Dutch; "régions ultrapériphériques (RUP)" in French; "Gebiete in äußerster Randlage" in German and "regiones ultraperiféricas" in Spanish. For a detailed discussion, see various chapters in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 492 pp., in particular Omarjee, "Specific Measures for the Outermost Regions after the Entry into force of the Lisbon Treaty", in D. Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 121-136; Kochenov, "Substantive and Procedural issues in the Application of European Law in the Overseas Possessions of European Union Member States" (2008-2009) 17 *Mich. St. J. Int'l L.,* 28-245 and 268-288 and the references cited; Faberon and Ziller *Droit des collectivités d'outre-mer* (Paris, LGDJ, 2007), 111-150; Rubio, "Les régions ultrapériphériques de l'Union Européenne", in L. Tesoka and J. Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité*, (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 121-138. On the future direction of the EU's partnership with the outermost regions, see the "Council conclusions on the Outermost Regions", 3023rd Foreign Affairs Council meeting (14 June 2010) and the Commission Communication "A stronger partnership for the outermost regions", COM (2004) 343 final.

6 Article 349, first para, TFEU. The Treaty of Amsterdam significantly changed the wording of this provision. On the basis of the more restrictive wording of old Article 227(2) TEC, the ECJ had already judged that the French Overseas departments were an integral part of the French Republic and that they in consequence fell within the territorial scope of the Treaties, although it would always be possible to adopt specific measures in order to meet the needs of those territories. See ECJ, Case C-163/90 *Legros* [1992] E.C.R. I-4625, paras 7-8; ECJ, Case 91/78 *Hansen GmbH & Co. v Hauptzollamt de Flensburg* [1979] E.C.R. 935.

common policies (Article 349, first para., TFEU).[7] These measures must concern, in particular, areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes (Article 349, second para., TFEU). When adopting such measures, the Council has to take into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies (Article 349, third para., TFEU).[8] Very important is that measures allowing derogations from the Treaties are only allowed if they are limited in time and do no derogate further than strictly necessary.[9]

With regard to the OCTs, Article 355(2) TFEU states: "The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II". Throughout my analysis it will be my basic assumption therefore that only limited parts of Union law apply to the OCTs, namely only Part Four of the TFEU (Articles 198-204 TFEU). This basic assumption will be further nuanced in part III, when discussing some of the citizenship rights in detail. Based on the said assumption, and for reasons of convenience, I will in the following generally use the expressions "Member State" and "Union" as referring to those territories of the Member States to which Union law applies in full,[10] as opposed to the "OCTs", to which it applies to a limited extent only.

1. The Kingdom of the Netherlands

a) Constitutional structure

The Kingdom of the Netherlands is a union with federal characteristics comprising both territories in Europe and in the Caribbean.[11] Traditionally, it was made up of three constituent countries: the Netherlands (the country in Europe), the Netherlands Antilles (five islands in the Caribbean[12]) and Aruba (also in the Caribbean). The Kingdom was established with the proclamation of the Charter of the Kingdom of the Netherlands ("Statuut voor het Koninkrijk der Nederlanden",[13] *hereinafter* "Charter") on October 28,

---

7 See, *e.g.*, Council Regulation (EC) No 247/2006 of 30 January 2006 laying down specific measures for agriculture in the outermost regions of the Union, [2006] O.J. L42/1. See also, concerning special rules on regional aid applicable to outermost regions, ECJ, Case C-88/03 *Portugal v Commission* [2006] E.C.R. I-7115, paras 99-106, referring to the Commission Guidelines on national regional aid, [1998] O.J. C74/9. For a discussion of that judgment, see Lenaerts and Cambien, "Regions and the European Courts: Giving Shape to the Regional Dimension of Member States" (2010) 35 *E.L. Rev.*, 627-631 and the references cited.

8 See also the Declaration on the outermost regions of the Community, annexed to the Treaty on European Union, [1992] O.J. C191/104.

9 ECJ, Case C-212/96 *Chevassus-Marche* [1998] E.C.R I-743.

10 This includes the outermost regions mentioned in Article 355(1) TFEU.

11 See the discussion in Kortmann, *Constitutioneel Recht* (Deventer, Kluwer, 2008), 107-114; Borman, *Het Statuut voor het Koninkrijk* (Deventer, Kluwer, 2005), 231 pp.; Kraan, "The Kingdom of the Netherlands", in Prakke and Kortmann (eds.), *Constitutional law of 15 EU member states* (Deventer, Kluwer, 2004), 593.

12 Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten.

13 Rijkswet van 28 oktober 1954 (Stb. 503; PB 121) houdende aanvaarding van een Statuut voor het Koninkrijk der Nederlanden, as modified by rijkswetten van 22 november 1975 (Stb. 617; PB 233),

1954. The Charter enumerates the most important competences of the Kingdom ("Kingdom affairs") (see Charter, Article 3), while at the same time adding that still other competences may be declared to be Kingdom affairs by Act of Parliament (*Ibid.*). In all other matters, the constituent countries are almost completely autonomous (Charter, Article 41(1)). As a consequence, all constituent countries have their own constitution.

Since 10 October 2010, the structure of the Kingdom of the Netherlands has changed significantly.[14] The Netherlands Antilles have been dissolved. Two of the five islands, namely Curaçao and Sint Maarten have become constituent countries of the Kingdom in their own right. Hence, the Kingdom consists of four constituent countries. The other three islands formerly belonging to the Netherlands Antilles - collectively known as the "BES islands"[15]- have obtained the status of public body ("openbaar lichaam"), which is close to that of a Dutch municipality, although they do not belong to a Dutch province.[16] To implement these changes, the Charter of the Kingdom of the Netherlands has been modified.[17] In the future, the changes will possibly also be incorporated in the Dutch Constitution.[18]

The Kingdom of the Netherlands is a Member State of the European Union, but its constituent countries are not.[19] This is logical, as foreign relations are a "Kingdom matter"[20] and as the sole subject of international law is the Kingdom of the Netherlands.[21] The Treaties are nevertheless only applicable in full to the Netherlands (the European part of the Kingdom). This situation is possible because the Kingdom of the Netherlands can

---

11 januari 1985 (Stb. 148; PB 95), 22 juli 1985 (Stb. 452; PB 102; AB 35), 15 december 1994, Stb. (1995, 1; PB 1995, 34; AB 1995, 18) en 7 september 1998 (Stb. 597; PB 1999, 22, AB).

14 For up to date information on the issue, including legislative proposals and recent legislative changes, see the website of the Dutch government: http://www.rijksoverheid.nl/onderwerpen/caribische-deel-van-het-koninkrijk. For more in-depth discussions of the changes, see Croes, *De herdefiniëring van het Koninkrijk* (Nijmegen, Wolf Legal Publishers, 2006), 513 pp.; Croes, "De desintegratie van de Nederlandse Antillen" (2007) *Ars Aequi*, 316-322 and, from a more international law point of view, Hillebrink, *The right to self-determination and post-colonial governance: the case of the Netherlands Antilles and Aruba* (The Hague, T.M.C. Asser Press, 2008), 391 pp.

15 Namely Bonaire, Saba and Sint Eustatius.

16 The possibility to create public bodies is laid down in Article 134 of the Dutch Constitution. This served as the legal basis for the act governing the specific status of the BES islands; see the Wet van 17 mei 2010, houdende regels met betrekking tot de openbare lichamen Bonaire, Sint Eustatius en Saba (Wet openbare lichamen Bonaire, Sint Eustatius en Saba) (*Stb.* 2010, 345). On the reasons for and consequences of these changes, see the interesting *report* of the "Tweede Kamer" of the Dutch Parliament "Regels met betrekking tot de openbare lichamen Bonaire, Sint Eustatius en Saba (Wet openbare lichamen Bonaire, Sint Eustatius en Saba)", *available at* http://ikregeer.nl/document/kst-31954-7.

17 See the Rijkswet van 7 september 2010 tot wijziging van het Statuut voor het Koninkrijk der Nederlanden in verband met de wijziging van de staatkundige hoedanigheid van de eilandgebieden van de Nederlandse Antillen (Rijkswet wijziging Statuut in verband met de opheffing van de Nederlandse Antillen), which entered into force on 10 October 2010.

18 See already the proposal for a constitutional amendment, *available at* http://www.internetconsultatie.nl/grondwetbeseilanden (see "Voorontwerp wijziging Grondwet over staatkundige positie BES-eilanden" (2010) *N.J.B.*, 1391).

19 See the list of Member States in Article 52(1) TEU.

20 Charter, Article 3b and Articles. 24 *et seq.* See also Article 29 of the Vienna Convention of May 23, 1969 on the Law of Treaties.

21 Kortmann *Constitutioneel recht* (4th ed.) (Deventer, Kluwer, 2001), 179. See also Submission of the Netherlands Government in ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 24.

conclude treaties for each of the constituent countries separately,[22] which is shown in practice by mentions such as "the Kingdom of the Netherlands (for the Netherlands)", "the Kingdom of the Netherlands (for Aruba)" or, historically, "the Kingdom of the Netherlands (for the Netherlands Antilles)". In the following, I will give a brief overview of the applicability of the Treaties to the different constituencies of the Kingdom of the Netherlands and the historical developments on this point.

b) Applicability of the Treaties

The original version of the EEC Treaty was ratified exclusively for the European territory of the Kingdom and for New Guinea,[23] which is apparent from the statement "for the Kingdom of the Netherlands (for the Netherlands and New Guinea)". This ratification for limited parts of the Kingdom only was explicitly authorised by a Protocol added to the EEC Treaty,[24] stating:

> "The Government of the Kingdom of the Netherlands, by reason of the constitutional structure of the Kingdom resulting from the Statute of 29 December 1954, shall […] be entitled to ratify the Treaty on behalf of the Kingdom in Europe and Netherlands New Guinea only."[25]

On the occasion of the ratification of the EEC Treaty, the Kingdom of Netherlands had declared, in accordance with this Protocol, that the EEC Treaty was not applicable at all to Surinam – at that time a Dutch colony and constituent country of the Kingdom of the Netherlands – and the Netherlands Antilles. At the same time, however, the founding Member States of the EEC submitted a declaration indicating their readiness to open negotiations, at the request of the Kingdom of the Netherlands, with a view to concluding conventions for the economic association of Surinam and the Netherlands Antilles with the Community.[26]

Surinam became independent on 25 November 1975.[27] Consequently, the Treaties never became applicable to it.[28] However, it should be remarked that, after its independence,

---

22 See the submissions of the Netherlands Government in ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, paras 22 *et seq*.

23 Netherlands New Guinea was a former colony of the Netherlands, and former part of the Kingdom of the Netherlands. The territory was placed under UN administration in October 1962, by virtue of an agreement signed on 15 August 1962. It was passed on from the UN to Indonesia on 1 May 1963 and formally annexed by Indonesia in 1969. As a consequence, from then onwards the EC Treaty was no longer applicable to it. See Hartley *EEC Immigration Law* (Amsterdam, North-Holland, 1978), 50.

24 Protocol on the application of the Treaty establishing the European Economic Community to the non-European parts of the Kingdom of the Netherlands. See http://www.unizar.es/euroconstitucion/library/historic%20documents/Rome/Annex%20and%20protocols%20EEC.pdf. This protocol was repealed by the Treaty of Amsterdam.

25 New Guinea was included in Annex IV (the later Annex II) to the TEEC as a Dutch OCT. For a discussion of the original list in Annex IV, see Fransman *Fransman's British Nationality Law* (2nd ed.) (London, Edinburgh & Dublin, Butterworths, 1998), 63 *et seq*.

26 Declaration of intent on the Association of Surinam and the Netherlands Antilles with the European Economic Community, annexed to the Final Act to the Treaty Establishing the European Economic Community (25/03/1957).

27 See the Rijkswet of 22 November 1975, Stb. 617, PbNA 233, stipulating that Surinam will no longer be part of the Kingdom of the Netherlands, and modifying the Charter accordingly.

28 The provisions of Part Four of the Treaty were applicable to Surinam, from 1 September 1962 to 16 July 1976, by virtue of a Supplementary Act of the Kingdom of the Netherlands to complete its instrument of ratification. This Act was deposited on 14 August 1962 and came into force on 1 September 1962. See the footnote under Protocol (No 13) annexed to the Treaty establishing the

Surinam became a party to the ACP-EC Convention: first to the original Convention signed at Lomé on 28 February 1975[29] and later to the new ACP Convention concluded at Cotonou on 23 June 2000[30] for a twenty-year period.[31] The scheme applicable under the ACP-EC convention is substantively almost identical to that of the association scheme under Part Four of the TFEU,[32] the biggest difference being perhaps that the association scheme under Part Four of the TFEU does not require any institutions of its own.[33] Consequently, the part of the Union *acquis* applicable to Surinam is substantively identical to that applicable to the Dutch OCTs. However, as far as the provisions on Union citizenship are concerned, important differences exist between Surinam, on the one hand, and the Netherlands Antilles, on the other hand, as will be shown below.

The Netherlands Antilles were added to the list in Annex II to the Treaties (then Annex IV to the TEEC) by virtue of the Convention of 13 November 1962 amending Part Four of the EEC Treaty.[34] Hence, Part Four of the TEEC became applicable to these territories. Aruba was originally part of the Netherlands Antilles, so Part Four of the TEEC became applicable to it with the aforementioned Convention of 1962 (which referred the Netherlands Antilles

---

European Community on goods originating in and coming from certain countries and enjoying special treatment when imported into a Member State, [2006] O.J. C321E/250. On the effects of this Supplementary Act: see Hartley *EEC Immigration Law* (Amsterdam, North-Holland, 1978), 50.

29 ACP-EC Convention of 28 February 1975, [1976] O.J. L25. This Convention was to be renewed every 5 year. See: Second ACP-EC Convention of 31 October 1979, [1980] O.J. L347; Third ACP-EC Convention of 8 December 1984, [1986] O.J. L86; Fourth ACP-EC Convention of 15 December 1989, [1991] O.J. L229/3 (concluded for ten years and since revised by the Convention of 4 November 1995 of Mauritius [1998] O.J. L156/3).

30 Partnership Agreement between the African, Caribbean and Pacific Group of States (ACP), of the one part, and the European Community and its Members States, of the other part, signed in Cotonou on 23 June 2000, [2000] O.J. L317/3, approved by Council Decision 2003/159/EC of 19 December 2002, [2003] O.J. L65/27. Under Article 95, amendments may be made at the end of each five-year period. See *e.g.* Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, [2005] O.J. L209/27. For a discussion of the ACP-EC agreement, see Babarinde and Faber, "From Lomé to Cotonou: Business as Usual?" (2004) *E.For.Aff.Rev*., 27-47; Arts, "ACP-EU Relations in a New Era: The Cotonou Agreement" (2003) *CML Rev*., 95-116; Vincent, "L'entrée en vigueur de la convention de Cotonou" (2003) *C.D.E.*, 157-176. The ACP-EC Partnership Agreement entered into force on 1 April 2003.

31 Besides, Surinam has concluded other agreements with the EU, like *e.g.* the Agreement in the form of an Exchange of Letters between the European Community and Barbados, Belize, the Republic of the Congo, Fiji, the Cooperative Republic of Guyana, the Republic of Côte d'Ivoire, Jamaica, the Republic of Kenya, the Republic of Madagascar, the Republic of Malawi, the Republic of Mauritius, the Republic of Mozambique, the Republic of Surinam, Saint Kitts and Nevis, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Trinidad and Tobago, the Republic of Uganda, the Republic of Zambia and the Republic of Zimbabwe on the guaranteed prices for cane sugar for the 2005/2006 delivery period, [2006] O.J. L358/53.

32 Ziller, "Champ d'application du droit communautaire" (Paris, Editions du Juris-Classeur) fasc. 470 *Juris-Classeur Europe, available at* www.lexisnexis.com, nr. 76. This is also confirmed in the Commission Green Paper on Future relations between the EU and the Overseas Countries and Territories, COM(2008) 383 final, 2.

33 Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 974.

34 There is no authentic English version of this document, the only authentic versions being the Dutch, French, German and Italian one. See for the official publication in French: Convention 64/533/CEE portant révision du traité instituant la Communauté économique européenne en vue de le régime spécial d' association défini dans la quatrième partie de ce traité, [1964] J.O. 2414/64. For the entry into force, see: Entrée en vigueur de la convention portant révision du traité instituant la Communauté économique européenne en vue de rendre applicable aux Antilles néerlandaises le régime spécial d'association défini dans la quatrième partie de ce traité, [1964] J.O. 2414/64.

without specifying the constituent islands). On 1 January 1 1986, however, Aruba gained independence from the other Antilles [35] without becoming independent from the Netherlands.[36] At the same time, it became a constituent country of the "Kingdom of the Netherlands" in its own right.[37] The fact that Aruba became independent from the other Antilles meant that Annex IV had to be adapted in order to encompass Aruba. The Treaty of Amsterdam brought Annex IV (which it renamed Annex II) up to date, by explicitly listing Aruba, on the one hand, and the Netherlands Antilles,[38] on the other hand. The bottom-line is that Aruba and the Netherlands Antilles are now recognised as OCTs and fall under the provisions of Part Four of the TFEU (see Article 355(2) TFEU).[39] Interesting to note in this connection is that the Lisbon Treaty was approved for the Kingdom of the Netherlands in its entirety ("voor het gehele Koninkrijk").[40] Thus, the Treaties apply to the Dutch OCTs, to the limited extent foreseen by Article 355(2) TFEU.[41]

The recent changes in the constitutional structure of the Kingdom of the Netherlands did not immediately change anything as regards the status of the Dutch OCTS under Union law. The fact that two of the Netherlands Antilles became independent constituent countries of the Kingdom, whereas the other three were transformed into public bodies, did not change their

---

35 This was agreed by the State of the Netherlands, the State of the Netherlands Antilles and the Island Governments during a conference held from 7 to 12 March 1983 at The Hague. Transitional measures were laid down in a law of 1985, see "Rijkswet van 20 juni 1985, houdende vaststelling van enige overgangsbepalingen in verband met het verkrijgen van de hoedanigheid van land in het Koninkrijk door Aruba". Also in 1985, the maritime boundary between Aruba and the Antilles was determined, see "Rijkswet van 12 december 1985, tot vaststelling van een zeegrens tussen de Nederlandse Antillen en Aruba".

36 The 1983 conference envisaged that Aruba would first become an autonomous country and member of the Kingdom of the Netherlands and achieve full independence 10 years later, in 1996. However, in 1990, movement towards independence was postponed upon the request of Aruba's former Prime Minister, Nelson O. Oduber. The article scheduling Aruba's complete independence was rescinded in 1995, but the process for independence could start again after a referendum.

37 See the Rijkswet van 22 juli 1985 tot wijziging van het Statuut voor het Koninkrijk der Nederlanden, houdende losmaking van Aruba uit het Staatsverband van de Nederlandse Antillen (Stb. 148; PB 95). The preamble to the Charter considers that "Aruba has expressed freely its will to accept the [constitutional order of the Kingdom of the Netherlands] as a Country".

38 The Annex refers to "the Netherlands Antilles", and then explicitly names the five constituent islands (Bonaire, Curaçao, Saba, Sint Eustatius and Stint Maarten).

39 Furthermore, special rules apply by virtue of Protocol (No 31) concerning imports into the European Union of petroleum products refined in the Netherlands Antilles, [2010] O.J. C83/315. (Originally published in the Official Journal of 1964 as annex to the 1962 Convention: Protocole relatif aux importations dans la communauté économique européenne de produits pétroliers raffinés aux Antilles néerlandaises, [1964] J.O. 64/2416). See also: Recommandation de la Commission, du 3 avril 1968, adressée aux États membres, relative aux modalités administratives pour l'application de l'article 7 du protocole relatif aux importations dans la Communauté économique européenne de produits pétroliers raffinés aux Antilles néerlandaises [1968] J.O. L94/15

40 Rijkswet van 10 juli 2008, houdende goedkeuring van het op 13 december 2007 te Lissabon totstandgekomen Verdrag van Lissabon tot wijziging van het Verdrag betreffende de Europese Unie en het Verdrag tot oprichting van de Europese Gemeenschap, met Protocollen en Bijlagen (Trb. 2008, 11).

41 By contrast, the Act of Ratification of the Treaty on European Union was approved by the Dutch Queen "for the Kingdom of the Netherlands (for the Netherlands)" (see the Rijkswet van 17 december 1992, houdende goedkeuring van het op 7 februari 1992 te Maastricht tot stand gekomen Verdrag betreffende de Europese Unie, met Protocollen, en een Overeenkomst betreffende de sociale politiek tussen de Lidstaten van de EG, met uitzondering van het Verenigd Koninkrijk (Stb. 692). As a result, the TEU only applied to the European part of the Kingdom of the Netherlands. See also the submissions of the Netherlands Government in ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 24.

status as OCTs. The changes did not even make it necessary to update Annex II to the Treaties, since all five islands were already explicitly mentioned therein. Still, it cannot be ignored that the status of the different islands under Dutch constitutional law and the intensity of their relation with the Netherlands has been changed significantly. Inevitably the question arises, therefore, whether the constitutional changes also necessitate or make desirable a change of their status under Union law. This would seem most relevant with regard to the BES islands, since their transformation into public bodies has resulted in them becoming part of the territory of the Netherlands, as far as Dutch constitutional law is concerned. Hence, Dutch law will gradually become fully applicable to them, including those aspects that derive from Union law – such as transposed Directives. It could be wondered whether it would not be more appropriate then to change their status from that of an OCT to that of an outermost region. The question of a possible change of status under Union law has been (and still is) the subject of a fierce debate in the Netherlands and the Dutch OCTs.[42] The Dutch government decided in 2008 not to change the EU status of the Dutch overseas possessions, at least not immediately. At the same time it was agreed that the government will reconsider the EU status of the BES islands after five years of their integration into the Netherlands.[43]

It remains to be seen, therefore, what the future status of the Dutch overseas possessions under Union law will be. This is a matter to be decided by the Dutch government, as it concerns a matter of internal constitutional law. The decision will have to be respected by the EU without more. A change of status of one or more islands from OCT to outermost region does, since the entry into force of the Lisbon Treaty, no longer necessitate an amendment of the Treaties. New Article 355(6) TFEU, which has no equivalent under the TEC, states:

> "The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or

---

42 For a detailed analysis of the possible options for a change of status under Union law, see "Banden met Brussel. De betrekkingen van de Nederlandse Antillen en Aruba met de Europese Unie", *report of 1 July 2004 of the Commissie ter bestudering van mogelijke toekomstige relaties van de Nederlandse Antillen en Aruba met de Europese Unie*, *available at* http://www.eerstekamer.nl/eu/publicatie/20040701/betrekkingen_van_de_nederlandse. See also opinion of 18 September 2006 in case W04.06.0204/I/K/A of the Dutch Council of State (*available at* http://www.raadvanstate.nl/adviezen/zoeken_in_adviezen/zoekresultaat/?zoeken_veld=bonaire&advicepub_id=5866), which considers the change to the status of outermost region advisable. See also the very informative discussion in Kochenov, Bröring and Hoogers, "Staatsrechtelijke consequenties van de toekenning van een UPG-status aan Aruba en de Eilandgebieden van de huidige Nederlandse Antillen" (2010) 26 *Tijdschrift voor Antilliaans Recht - Justicia*, 10-24 (authors discuss a third intermediate option between the status of OCT and outermost region, namely that of "OCT plus", which comes down to OCTs deliberately adopting parts of Union law and maximising the potential of their status for intensifying their links with the EU); Hoogers, "De herstructurering van het Koninkrijk als lakmoesproef. Kanttekeningen vanuit constitutioneel perspectief bij de opheffing van de Nederlandse Antillen" (2010) *TvCR*, 256-285; Hoogers, "De BES-eilanden, de Grondwet en het Europese recht. Over constitutionele en Europeesrechtelijke consequenties van de handhaving van de LGO-status van de BES-eilanden" (2009) *RegelMaat,* 5-23*;* and Bröring, Kochenov, Hoogers and Jans *Schurende rechtsordes; Over de Europese Unie, het Koninkrijk en zijn Caribische gebieden* (Groningen, Europa Law Publishing, 2008), 147-187.

43 See the website of the Dutch government: http://www.rijksoverheid.nl/documenten-en-publicaties/persberichten/2008/10/01/bonaire-sint-eustatius-en-saba-behouden-lgo-status.html, in particular the links to the Letters of the Dutch Cabinet to the "Tweede Kamer" of the Dutch Parliament.

territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission".[44]

This provision was inserted on the instigation of, *inter alia*, the Dutch government.[45] This is confirmed by a declaration of the Dutch government annexed to the Treaties according to which the Netherlands will bring the initiative for a change in the status of the Netherlands Antilles (and Aruba) when a decision to that regard is taken, by the Dutch government, in accordance with the modified Charter for the Kingdom of the Netherlands.[46] Another Member State which is expected to bring an initiative for using Article 355(6) TFEU in the near future is France (see the discussion on Mayotte under II.A.2., *infra*).

2. France

The second Member State with OCTs is the French Republic. The French Republic comprises the areas of Metropolitan France ("France Métropolitaine") and the French overseas territories ("France d'outre-mer"[47]). The status of French overseas territories under French constitutional law is diverse and has been the subject of recent changes.[48] These different statuses have different consequences for the applicability of Union law and possibly also, therefore, with regard to Union citizenship.

a) Overseas Departments and Regions

In the first place, there are the French overseas departments and regions ("départements et régions d'outre-mer", often referred to as "DOM-ROM"). They have in principle the same status under French constitutional law as the departments and regions in the European part of France (see Article 73 of the French Constitution). At present, five territories have this status: French Guiana, Guadeloupe, Martinique, Réunion and Mayotte. With the exception of Mayotte, these territories are considered to be among the so-called "outermost regions" and, consequently, the Treaties are in principle fully applicable to

---

44 See the discussion in Ziller, "Outermost Regions, Overseas Countries and Territories Others after the Entry into Force of the Lisbon Treaty", in D. Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 69-88.

45 The provision was originally inserted in the (rejected) EU Constitution as Article IV-440(7). See the discussion in Ziller, "L'Union Européenne et l'Outre-Mer" (2005) 113 *Pouvoirs*, 145-158.

46 Declaration by the Kingdom of the Netherlands on Article 355 of the Treaty on the Functioning of the European Union, [2010] O.J. C83/358 ("The Kingdom of the Netherlands declares that an initiative for a decision, as referred to in Article 355(6) aimed at amending the status of the Netherlands Antilles and/or Aruba with regard to the Union, will be submitted only on the basis of a decision taken in conformity with the Charter for the Kingdom of the Netherlands")

47 Often the term DOM-TOMs is used to refer to these territories, but this terminology does no longer reflect the correct Constitutional status of these territories since the Constitutional amendments of 2003. See the discussion in Jorda, "Les collectivités territoriales outre-mer et la révision de la Constitution" (2003) *R.F.D. Const.*, 697-723.

48 For more particulars, see Faberon and Ziller *Droit des collectivités d'outre-mer* (Paris, LGDJ, 2007), 546 pp; Gautron, "Le statut communautaire des DOM et de PTOM" (2006) *Rev. Aff. Eur.*, 385-393; Luchaire, "La France d'outre-mer et la République" (2007) *R.F.D.A.P.*, 399-407 (dealing with the question of whether the overseas territories could decide to become independent from France). The following overview is loosely based on these sources.

them (Article 355(1) TFEU).[49] As was explained above, Union law applies in full to these regions, but derogations may apply to take account of their specific situation.[50]

Mayotte is a case apart. Historically, it was an overseas collectivity, but in 2011 its status was changed to that of an overseas department.[51] This explains why Mayotte is listed in Annex II to the Treaties and not in Article 355(1) TFEU. In the near future, its status under Union law will however be changed from that of an OCT to that of an outermost region, in order to reflect its changed status under French constitutional law. This change can be brought about by European Council Decision adopted on the basis of Article 355(6) TFEU, without amending the Treaties.[52] The other Member States have, in a declaration annexed to the Treaties, already agreed to such a change of status. Indeed, Declaration (No 43) on Article 355(6) TFEU states[53]:

> "The High Contracting Parties agree that the European Council, pursuant to Article 355(6), will take a decision leading to the modification of the status of Mayotte with regard to the Union in order to make this territory an outermost region within the meaning of Article 355(1) and Article 349, when the French authorities notify the European Council and the Commission that the evolution currently under way in the internal status of the island so allows."

b) Overseas Collectivities

In the second place, there are the French overseas collectivities ("collectivités d'outre-mer", often referred to as "COM"). These territories have varying legal statuses and different levels of autonomy. Article 74 of the French Constitution specifically provides that the status, competences and institutional organisation of the overseas Collectivities are to be determined for each of them by a specific law (*loi organique*). At present, they are five in number: French Polynesia,[54] Saint Pierre and Miquelon,[55] Wallis and Futuna, Saint Barthélemy and Saint-Martin.[56]

---

49 Article 355(1) refers *expressis verbis* to Guadeloupe, French Guiana, Martinique and Réunion. Article 299(1) TEC referred to the French overseas departments (*départements d'outre-mer*). Since the constitutional reforms of 2003, each of these overseas departments constitutes an overseas region on its own (a *région mono-départementale*). As a result, Article 299(1) TEC in fact came to refer to the exact territories that are now termed overseas departments and regions (*départements et régions d'outre-mer*).

50 See Article 349, third para., TFEU and the Declaration on the outermost regions of the Community, annexed to the Treaty on European Union, [1992] O.J. C191/104.

51 See Busson, "Mayotte, 101e département français: un modèle pour une République renouvelée?" (2010) *R.D.P.*, 711-728.

52 See also under II.A.1., *supra*.

53 Declaration (No 43), annexed to the Treaties, on Article 355(6) of the Treaty on the Functioning of the European Union, [2010] O.J. C83/351.

54 Until 2003 French Polynesia had the status of overseas territory (*territoire d'outre mer*). For a discussion, see Arlettaz, "L'autonomie polynésienne dans la République décentralisée" (2005) *Rev. b. dr. const.*, 19-41.

55 Between 1976 and 1985 Saint Pierre and Miquelon held the status of a DOM, but the effects of this change as regards Union law form the object of a debate in legal literature. See the discussion in Kochenov, "Substantive and Procedural issues in the Application of European Law in the Overseas Possessions of European Union Member States" (2008-2009) 17 *Mich. St. J. Int'l L.*, 263-265.

56 Saint-Martin and Saint-Barthélemy were formerly part of Guadeloupe, a French Overseas department. In 2003 the population of Saint-Martin and Saint-Barthélemy voted in favour of secession from Guadeloupe in order to form separate overseas collectivities of France. On 7 February 2007, the French Parliament passed a bill granting COM status to both Saint-Barthélemy and neighbouring Saint-Martin. The new status took effect on 22 February 2007 when the law was

The overseas collectivities are true OCTs in the sense of Article 355(2) TFEU and are mentioned in Annex II to the Treaties. Consequently, only limited parts of the Treaties are applicable to them.[57] This is true for all overseas collectivities, but for the last two mentioned above: Saint Barthélemy and Saint-Martin. These territories are not mentioned in Annex II, and the Treaties apply in full to them. The reason is that before February 2007 these two territories were part of a French overseas department,[58] to which the Treaties are fully applicable. Contrary to what one might have expected, the Lisbon Treaty did not update the list in Annex II so as to include Saint-Barthélemy and Saint-Martin. Quite to the contrary, the notion "the French overseas departments" in Article 299(2) TEC was replaced by "Guadeloupe, French, Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin" (Article 349, first para. and 355(1) TFEU. As a result, Saint-Barthélemy and Saint-Martin have kept their status of outermost regions under Union law.

The status of Saint-Barthélemy under Union law will change, however, in the near future. By virtue of a European Council Decision adopted under Article 355(6) TFEU, Saint-Barthélemy will cease to be an outermost region and become an OCT with effect from 1 January 2012.[59] The wording of Articles 349, first para., and Article 355(1) TFEU will be changed accordingly and Saint-Barthélemy will be added to the list in Annex II to the Treaties.[60] French law already took this possible change of status into account.[61]

c) French Southern and Antarctic Territories

The French Southern and Antarctic Territories (*Terres australes et antarctiques françaises; TAAF*) comprises a group of volcanic islands in the southern Indian Ocean,[62] Adélie Land[63] and the Scattered islands in the Indian Ocean. They are not, technically speaking, overseas collectivities and their status under French constitutional law is given shape in a different way, due to the particularities of these regions.[64] The French Constitution mentions them separately from the other territories and provides that their status and organisation should be determined by legislative act (Article 72-3). Their status does however closely resemble that of overseas collectivities. From the perspective of

---

published in the *Journal Officiel*: Loi organique n° 2007- 223 du 21 février 2007 portant dispositions statutaires et institutionnelles relatives à l'outre-mer, [2007] JORFLoi organique n° 2007- 223 du 21 février 2007 portant dispositions statutaires et institutionnelles relatives à l'outre-mer, [2007] JORF . See Oraison, "Le statut nouveau de collectivité d'outre-mer des îles de Saint-Barthélemy et de Saint-Martin" (2007) *R.D.P.*, 153-183; Diémert, "La création de deux nouvelles collectivités d'outre-mer régies par l'article 74 de la Constitution: Saint-Barthélemy et Saint-Martin" (2007) *R.F.D.A.*, 669-680.

57 For a brief analysis, see Blot, "L'application du traité CE aux territoires d'outre-mer" (2003) *A.J.D.A.*, 1426-1429.

58 See n. 56, *supra*.

59 European Council Decision of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy [2010] O.J. L325/4, Article 1.

60 *Ibid.*, Article 2.

61 See Article LO6214-3 (II) of the Code général des collectivités territoriales.

62 Divided into three districts: Kerguelen, Crozet and Saint-Paul-et-Amsterdam.

63 The French claim on the Antarctica continent under the Antarctic Treaty System.

64 See Eveillard, "Le statut des Terres Australes et Antarctiques Françaises après la loi du 21 février 2007" (2008) *R.D.P.*, 103-138; Garde, "L'Antarctique, ultime frontière de l'Europe", in L. Tesoka and J. Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité*, (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 411-426.

Union law, they have the same status as overseas collectivities, given the fact that they are mentioned in Annex II to the Treaties.[65]

d) New Caledonia and Dependencies

New Caledonia, formerly a French "overseas territory" ("territoire d'outre-mer"), has had a *sui generis* status under French Constitutional law since 1999.[66] Its status is different from that of other French overseas territories in that it has greater autonomy than other territories and this autonomy will, moreover, increase over time. Indeed, the relationship between France and New Caledonia is regulated by the so-called "Nouméa Agreement of 1998", which provides for a step by step transfer of competences to New Caledonia until full independence is achieved.[67] The Agreement states that, until then, France will continue to be competent for certain policy areas, which will at least include defence, foreign affairs, immigration, justice and monetary policy (the so-called "compétences régaliennes"). The French Constitution provides, in a separate title on transitional provisions concerning New Caledonia, that an organic law (*loi organique)* is to lay down the arrangements for putting the Nouméa Agreement into place. These arrangements are laid down in an organic law of 1999.[68]

As far as Union law is concerned, New Caledonia has exactly the same legal status as the French overseas collectivities. New Caledonia and Dependencies are listed in Annex II to the Treaties, which means that the Treaties apply to a limited extent only, as was explained higher.

e) Clipperton Island

A particular case is Clipperton Island (*Île de Clipperton* or *Île de la Passion* in French), an uninhabited and extremely small island in the eastern Pacific Ocean, southwest of Mexico. Since the constitutional reform of 2003, Clipperton Island is explicitly mentioned in the French Constitution. As is the case for the French Southern and Antarctic Territories, the Constitution states that the status and the organisation of the island is to be determined by legislative act (Article 72-3). Consequently, it does not have the status of an overseas collectivity, but a status that can only be qualified as *sui generis*.[69]

---

65 Before the entry into force of the Lisbon Treaty, the only question concerning the applicability of Union law could arise with regard to the scattered Islands, as they were only added to the TAAF in 2007 and were not part of the TAAF when the latter were included in Annex II to the Treaties. However, since the Lisbon Treaty did not change the list of territories in Annex II, it can be assumed that the scattered islands are part of the TAAF for the purposes of the application of Union law.

66 For a detailed discussion, see Faberon, "La Nouvelle-Calédonie et l'Union Européenne: le volontarisme d'un PTOM en situation de souveraineté partagée", in L. Tesoka and J. Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité*, (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 285-302; Custos, "New Caledonia, a Case of Shared Sovereignty within the French Republic: Appearance or Reality?" (2007) 13 *E.P.L.*, 97-132; Clinchamps, "Les collectivités d'Outre-Mer et la Nouvelle-Calédonie: le fédéralisme en question" (2005) *Pouvoirs*, 73-93.

67 Accord sur la Nouvelle-Calédonie signé à Nouméa le 5 mai 1998 [1998] JORF.

68 Loi organique no 99-209 du 19 mars 1999 relative à la Nouvelle-Calédonie, [1999] JORF, 4197.

69 For more details, see Verpeaux, "Les innovations intéressant l'Outre-mer: modifications des articles 72-3, 73 et 74-1 de la Constitution" (2008) *Les Petites Affiches*, 120-122; Oraison, "A propos du nouveau statut interne du récif de Clipperton fixé par la loi ordinaire du 21 février 2007, 'portant dispositions statutaires et institutionnelles relatives à l'outre-mer': radioscopie du dernier 'territoire

Curiously, in contrast to the French Southern and Antarctic Territories, Clipperton Island is not mentioned in Annex II to the Treaties. Its status under Union law is somewhat enigmatic, therefore. Probably, the island has the same status under Union law as mainland France, since it does not have any administrative organisation, unlike other French overseas possessions. Clipperton Island is directly administered by the French government and the French laws and regulations are directly applicable in its territory.[70] This would, in the absence of an explicit conferral of the status of OCT or outermost region, seem to imply that the Treaties are fully applicable.[71] In any event, the uncertainty regarding the status of Clipperton Island under Union law does not matter much for my analysis of the legal status of OCT nationals in the light of Union citizenship, since the island is uninhabited.

3. Denmark

The next Member State which possesses OCTs is the Kingdom of Denmark.[72] The Kingdom of Denmark comprises the territories of Denmark proper, the Faeroe Islands and Greenland. Both Greenland and the Faeroe Islands are self-governing Danish provinces. The Faeroe Islands were granted home rule in 1948[73] and Greenland in 1978.[74] The Danish Constitution (*Danmarks Riges Grundlov*) applies to all three regions, but the home rule arrangements are set out in separate acts.[75] Both the Faeroe Islands and Greenland manage most of their internal affairs.[76] It is mostly foreign relations, defence and the legal system which are Kingdom matters.[77] These competences are in large part exercised by Denmark proper, on behalf of all three regions.

---

résiduel de la République française'" (2007) *Revue de la recherche juridique. Droit prospectif*, 729-740; Thiellay, "Les lois organique et ordinaire portant dispositions statutaires et institutionnelles relatives à l'outre-mer du 21 février 2007" (2007) *A.J.D.A.*, 631-635.

70 See Article 9 of Loi n°55-1052 du 6 août 1955 portant statut des Terres australes et antarctiques françaises et de l'île de Clipperton, as modified by Loi n°2007-224 du 21 février 2007 portant dispositions statutaires et institutionnelles relatives à l'outre-mer**.**

71 This is the opinion of Faberon and Ziller, who cite a 1985 Commission answer to the contrary and concludes that it is mistaken (Faberon and Ziller *Droit des collectivités d'outre-mer* (Paris, LGDJ, 2007), 447).

72 I will limit myself to a brief exposition of the Danish Constitutional structure, and its status under Union law. For more in-depth resources on Danish law, see the references listed in Wandall, "Researching Danish Law" (2006) *NYU Hauser Global Law School Program, available at* http://www.nyulawglobal.org/globalex/Denmark.htm and in Steenbeek and Gilhuis, "The Kingdom of Denmark", in Prakke and Kortmann (eds.), *Constitutional Law of 15 EU Member States* (Deventer, Kluwer, 2004), 179-180.

73 The Faeroe Islands Home Rule Arrangement was established by Act no. 137 of 23 March 1948 relating to Faeroe Islands Home Rule.

74 See Act no. 577 of 29 November 1978 relating to Greenland Home Rule.

75 See the Acts mentioned in the foregoing footnotes. For a more detailed discussion, see Jensen, "The Position of Greenland and the Faroe Islands Within the Danish Realm" (2003) 9 *E.P.L.*, 170-178.

76 As a result of a non-binding referendum on Greenland's autonomy, held on 25 November 2008, which was passed with a 75 % approval rate, the areas in which Greenland has autonomous competences were significantly expanded as from 21 June 2009 onwards. For a detailed discussion, see Dyrendom Graugaard, "National Identity in Greenland in the Age of Self-Government " (2009) *Centre for the Study of Global Power & Politics Working Paper 09/5 available at* http://www.trentuniversity.ca/globalpolitics/documents/Graugaard095.pdf.

77 See § 19 of the Danish Constitution.

The Treaties apply in full only to Denmark proper. Both Greenland and the Faeroe Islands have opted to remain outside the EU. The Faeroe Islands were excluded from the outset from the scope of application of the Treaties.[78] As a consequence, relations between the Faeroe Islands and the EU are to be regulated by bilateral agreements concluded between the EU and the Faeroe Islands.[79] Originally, when Denmark acceded to the EEC, the Treaties applied to Greenland in full. However, after Greenland was granted self-rule, it voted to leave the European Communities. After a consultative referendum in 1982 on membership of the European Community, it chose to leave the EC with effect from 1 February 1985.[80] From then onwards Greenland has been included in the list of OCTs in Annex II to the Treaties.[81] As a consequence, only limited parts of the Treaties are applicable to it. Article 204 TFEU provides that the provisions of Part Four only apply to Greenland, subject to the specific provisions for Greenland set out in a Protocol annexed to the Treaties.[82]

4. The United Kingdom

78 Article 355(5)(a) TFEU and Article 198 EAECT fourth para., indent (a); Upon Accession of Denmark in 1973, Denmark was given the option to declare, by 31 December 1975 at the latest, the Treaties applicable to the Faeroe Islands (see Articles 25 and 26 of the Act concerning the conditions of accession and the Adjustments to the Treaties, [1972] O.J. L73/19). This option was never exercised. The Treaty on Euopean Union removed it from the aforementioned articles.

79 *E.g.* Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part, [1997] O.J. L53/2; Agreement on fisheries between the European Economic Community, of the one part, and the Government of Denmark and the Home Government of the Faeroe Islands, of the other part, [1980] O.J. L226/12. See in more detail: Fagerlund, "Autonomous European Island regions Enjoying a Special Relationship with the European Union", in Lyck (ed.), *Constitutional and Economic Space of the small Nordic Jurisdictions: The Aaland Islands, the Faroe Islands, Greenland, Iceland* (Stockholm, Nordiska Institutet för Regionalpolitisk Forskning, 1997), 90-121.

80 See on this decision: Harhoff, "Greenland's Withdrawal From the European Communities" (1983) 20 *CML Rev.*, 13-33; Krämer, "Greenland's European Community (EC) referendum: Background and consequences" (1982) 25 *German Yearbook of International Law*, 273-289; Mason, "EC Commission Draft Approves Withdrawal of Greenland from the European Community and Proposes Terms for Economic Reassociation" (1983) 13 *Ga. J. Int'l & Comp. L.*, 865-876; Weiss, "Greenland's withdrawal from the European Communities" (1985) 10 *E.L. Rev.*, 173-185; Hjalte Rasmussen (ed.) *Greenland in the Process of Leaving the European Communities* (Copenhagen, Forlaget Europa, 1983), 95 pp.

81 Treaty amending, with regard to Greenland, the Treaties establishing the European Communities, [1985] O.J. L29/3, Article 4.

82 Protocol (No 34), annexed to the Treaties, on special arrangements for Greenland, [2010] O.J. C83/320 (replacing Protocol (No 15) annexed to the Treaty establishing the European Community on special arrangements for Greenland, [2006] O.J. C321E/254. The protocol concerns the common organisation of the market in fishery products. These arrangements are further specified in a Fishing Agreement and its implementing protocols: Agreement on fisheries between the European Economic Community, on the one hand, and the Government of Denmark and the local Government of Greenland, on the other, [1985] O.J. L29/9, now replaced by a new Fisheries Partnership Agreement: see Council Decision of 21 December 2006 on the conclusion of the Agreement in the form of an Exchange of Letters relating to the provisional application of the Fisheries Partnership Agreement between the European Community, on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other, [2006] O.J. C321E/1. The new Fisheries Partnership Agreement was approved on behalf of the EC by Council Regulation (EC) No 753/2007 of 28 June 2007, [2007] O.J. L172/1.

a) Overseas Territories

The British Overseas Territories are fourteen territories which the United Kingdom has under its sovereignty.[83] The name "British Overseas Territory" was introduced by the British Overseas Territories Act 2002, and replaced the name "British dependent territory", which was introduced by the British Nationality Act 1981. Before that, the territories were known as "colonies" or "Crown colonies".

Article 355(2), second subpara., TFEU states that the Treaties do not apply to "those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in [Annex II to the Treaties]". Annex II lists the following British Overseas Territories: Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands, Bermuda. These territories are OCTs in the sense of Article 355(2), first subpara., TFEU. In principle, Part Four of the TFEU applies to them, therefore. This is different only for Bermuda, to which the provisions of Part Four of the TFEU and the measures adopted thereunder are not applicable upon request of the Government of Bermuda.[84] Hence, Bermuda is an OCT, but Union law is not applicable in its territory. For this reason, in the following, references to "OCTs" do no not cover Bermuda.

At present, only two British overseas territories are *not* listed in Annex II.[85] The first overseas territory not included in Annex II is Gibraltar. Article 355(3) TFEU states that the Treaties apply to European territories for whose external relations a Member State is responsible. This boils down in practice to Gibraltar.[86] The 1972 Act of Accession provided

---

83 For the list of British overseas territories, the British Overseas Territories Act 2002 (Article 1) refers to Schedule 6 to the British Nationality Act 1981 The territories listed in schedule 6 are (taking later modifications into account): Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands & Dependencies, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie & Oeno Islands, the Sovereign Base Areas of Akrotiri & Dhekelia, St Helena & Dependencies, Turks & Caicos Islands, Virgin Islands. For more detailed discussions, see "Overseas Territories", (2007-2008) *House of Commons Foreign Affairs Committee Seventh Report of Session 2007-2008*, *available at* http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/147/147i.pdf.

84 See the website of the Commission on EU relations with Bermuda: http://ec.europa.eu/development/geographical/regionscountries/countries/country_profile.cfm?cid=bm&type=short&lng=en. See also recital (22) in the preamble to Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community, [2001] O.J. L314/5 ("The arrangements for association laid down in this Decision should not be applied to Bermuda in accordance with the wishes of the Government of Bermuda").

85 The British territories which are not considered to be OCTs used to be more important, as old Article 299(4) TEC used to exclude the application of the Treaties to Hong Kong (another former British Dependent Territory which has never been included in the list in Annex II).

86 See Declaration (No 55), annexed to the Treaties, by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, [2010] O.J. C83/356. See Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 437. The Treaties expressly exclude other territories, which could qualify (*e.g.* the Channel Islands and the Isle of Man; see the discussion *infra*). Nor are they considered to apply to Andorra (see, nonetheless, the commercial agreement in the form of an exchange of letters between the EEC and Andorra O.J. 1990 L 374/13).

that some major areas of Union law should not apply to Gibraltar,[87] in particular free movement of goods and harmonisation measures adopted for that purpose by the Union under Articles 114 and 115 TFEU.[88] The other provisions of the Treaties do apply in full.[89] Before the entry into force of the Lisbon Treaty, the EU Treaty was not expressly stated to be applicable to territories for the foreign relations of which a Member State is responsible. Acts adopted pursuant to the EU Treaty were, therefore, where appropriate, expressly declared to be applicable to Gibraltar.[90]

The second overseas territories not mentioned in Annex II are the two sovereign bases on Cyprus, known as Akrotiri and Dhekelia.[91] Prior to accession of Cyprus to the Union in 2004,[92] Union law did not apply to the sovereign bases (see old Article 299(6)(b) TEC). This was changed when Cyprus joined the Union.[93] Article 355(5) TFEU now states that the Treaties;

> "shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus […]and in accordance with the terms of that Protocol".

The protocol referred to[94] provides for the applicability of *inter alia* the Treaty provisions on agriculture and relating to the customs union. Substantial areas of Union law do therefore apply to these sovereign bases.

---

87 See Article 28 of the Act concerning the conditions of accession and the adjustments to the Treaties, [1972] O.J. L73/14, and Annex I(I) to this Act, [1972] O.J. L73/47.

88 See ECJ, Case C-30/01 *Commission v UK* [2003] E.C.R. I-9481.

89 ECJ, Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission of the European Communities* [2002] E.C.R. II-2309, para. 12.

90 *E.g.* Council Decision 2003/642/JHA of 22 July 2003 concerning the application to Gibraltar of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, [2003] O.J. L226/27.

91 For a detailed discussion, see Laulhé Shaelou, "The Principle of Territorial Exclusion in the EU: SBAs in Cyprus – A Special Case of Sui Generis Territories in the EU", in D. Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 153-175.

92 Cyprus became a member of the EU on 1 May 2004. See Article 2(2) of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, [2003] O.J. L236/17.

93 On the legal relations between the EU and Cyprus, see extensively Laulhé Shaelou, *The EU and Cyprus* (Leiden: Brill Academic Publishers, 2010), 410 pp.

94 Protocol (No 3) on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, [2003] O.J. L236/940. See also Protocol (No 10) on Cyprus, annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta,

b) Crown Dependencies

The territories of the Channel bailiwicks of Jersey and Guernsey and the Isle of Man, though also under the sovereignty of the British Crown, have a slightly different constitutional relationship with the United Kingdom. They are classed as Crown dependencies rather than Overseas Territories. This has important consequences with regard to British nationality law, as they are considered part of the UK,[95] unlike the overseas territories (cf. *infra*). However, as they are possessions of the British Crown they are not sovereign nations in their own right, and the power to pass legislation affecting the islands rests ultimately with the British Parliament. As far as Union law is concerned, it must be pointed out that the crown dependencies are not considered to be OCTs. They have a somewhat particular status under Union law. Article 355(5)(c) TFEU provides that the Treaties

> "shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972"

These special arrangements can be found in Protocol (No 3) annexed to the Accession Treaty.[96] In short,[97] the islands take part in the EU freedom of movement of goods but not persons, services or capital.[98] However, the authorities of these territories are under a duty not to discriminate between nationals of Member States (see Article 4 of Protocol (No 3)), and this duty is not limited to the areas of Union law that are applicable to these islands.[99] The former second and third pillar of Union law are not applicable to them.[100] The Lisbon Treaty did not change the position of the Isle of Man and the Channel Islands under Union law.[101]

---

the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, [2003] O.J. L236/955.

95 See s 50(2) of the British Nationality Act 1981, stipulating that, for the purposes of that act, the "United Kingdom" means Great Britain, Northern Ireland and the Islands, taken together.

96 Protocol (No 3) on the Channel Islands and the Isle of Man, annexed to the Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic the Italian Republic, The Grand Duchy of Luxembourg, the Kingdom of the Netherlands (Member States of the European Communities), The Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, [1972] O.J. L73/164.

97 This oversimplifies the issue, but this will in no way affect the following analysis.

98 This is confirmed in case law of the ECJ. See *e.g.* ECJ, Case C-355/89 *Barr and Montrose Holdings* [1991] E.C.R. I-3479; ECJ, Case C-171/96 *Pereira Roque* [1998] E.C.R. I-4607; ECJ, Case C-293/02 *Jersey Produce Marketing Organisation* [2005] E.C.R. I-9543.

99 ECJ, Case C-355/89 *Barr and Montrose Holdings* [1991] E.C.R. I-3479, para. 17.

100 Sutton, "Jersey's Changing Constitutional Relationship With Europe" (2005) *The Jersey Law Review, available at* http://www.jerseylaw.je/Publications/jerseylawreview/contents05.aspx, *available at* http://www.jerseylaw.je/Publications/jerseylawreview/default.aspx .

101 This is confirmed by a report from the Constitutional and External Relations Committee of the Isle of Man Council of Ministers, see https://www.gov.im/lib/news/cso/lisbontreatywoul.xml . Sutton adds however cautiously that "only time will tell whether the abolition of the Community and its replacement by the Union (with legal personality) will have an indirect political or legal effect on the Islands" (Sutton, "The evolving legal status of the Crown Dependencies under UK, European and

B. Nationality laws and personal scope of the citizenship provisions

In the following I will give a short overview of the nationality laws of the four Member States considered in the foregoing, in particular in relation to nationals resident in or having a particular connection with one of their OCTs. It will be shown how the different Member States have vastly different policies in this regard. This, in turn, will entail vastly different consequences under Union law for the nationals concerned, in particular given the fact that the status of Union citizenship is determined with regard to the nationality laws of the Member States. For each of the four Member States previously discussed, I will set out, first, the most important features of the nationality legislation in place in relation to citizens of the OCTs. Second, I will try to determine what the consequences are in view of the provisions on Union citizenship. More in particular, I will try to determine for each Member State whether nationals of the OCTs are to be considered Union citizens. It is important to stress that in this context I will only determine whether the nationals concerned formally posses the status of Union citizenship. The question to what extent they enjoy the rights attached to Union citizenship, and hence can be put on the same level with Union citizens from mainland Europe, will be answered below (see the discussion under III., *infra*).

1. The Kingdom of the Netherlands

a) One single nationality

Notwithstanding its division into different constituent State entities, the Kingdom of the Netherlands has one single nationality, the Dutch nationality (Dutch: "Nederlandschap").[102] Indeed, nationality is one of the "Kingdom matters" (Charter, Article 3c) and is accordingly regulated uniformly for all constituent states. Unlike for example the United Kingdom,[103] the Netherlands does not distinguish between different categories of citizens depending on their link with the Dutch territory. There is so to speak only one category of Dutch citizens, namely those having the Dutch nationality. The Netherlands could of course have specified who is to be regarded as a Dutch national for Union purposes (*i.e.* without changing the internal constitutional arrangements of

---

International Law", paper presented at the Lauterpacht Centre for International Law, University of Cambridge, 25 April 2008, *available at* http://www.lcil.cam.ac.uk/Media/lectures/pdf/Sutton%20lecture%20notes.pdf).

102 The rules concerning Dutch nationality are laid down in a recent Act which entered into force on 1 April 2004: Rijkswet van 19 december 1984, houdende vaststelling van nieuwe, algemene bepalingen omtrent het Nederlanderschap ter vervanging van de Wet van 12 december 1892, Stb. 1892, 268, op het Nederlanderschap en het ingezetenschap. See in detail: De Groot and Tratnik, *Nederlands nationaliteitsrecht* (Deventer, Kluwer, 2010), 239 pp; Van Oers, De Hart and Groenendijk, "Country Report: The Netherlands" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/Netherlands.pdf; De Groot *Handboek nieuw nationaliteitsrecht* (Deventer, Kluwer, 2003), 588 pp.

103 The British Nationality Act distinguishes between different categories of citizens. See the discussion, *infra*.

nationality).[104] This has never happened, but the possibility cannot be excluded that at some point in the future the Netherlands will lay down such a declaration.[105]

For the sake of completeness, it must be added that citizens settled in one of the former colonies of the Netherlands, namely in Indonesia and Surinam, are not normally Dutch nationals, even though before their independence, Dutch citizenship was held by many persons settled there. Most Dutch citizens living in these territories, upon their independence, acquired the citizenship of these countries and thereby lost their Dutch citizenship, although a small group of Dutch citizens were allowed to retain their Dutch citizenship.[106] In the following I will only analyse the consequences under Union law with regard to those individuals that are Dutch nationals.

b) Consequences with regard to Union citizenship

Article 20(1) TFEU clearly states: "every person holding the nationality of a Member State shall be a citizen of the Union". In consequence, as explained higher, the only requirement for being a Union citizen is having the nationality of a Member State. As a result, all Dutch nationals are Union citizens, including those resident in the Dutch overseas possessions. This has been explicitly confirmed by the ECJ.[107] As a matter of principle (and without pre-empting the detailed discussion below) they should enjoy, therefore, the rights conferred by the Treaties and be subject to the duties imposed thereby (Article 20(2) TFEU). This issue will be discussed in much detail below, under Title III.

2. France

French nationality legislation is fairly straightforward: there is only one single French nationality. Nationality is a policy area which is regulated for all overseas territories by Metropolitan France.[108] Citizens of the French overseas territories have the French nationality, which means they have the same rights under French law as French nationals settled in France. For example, citizens of overseas territories have the same voting rights in French presidential elections. As a consequence of Article 20(1) TFEU, all French

---

104 See Declaration (No 2) on nationality of a Member State, annexed to the Treaty on European Union, [1992] O.J. C191/98 and the discussion in Chapter 2, *infra* (under II.A.3).

105 See on this topic De Groot, "Visumplicht Antillianen/Arubanen en het Europese burgerschap" (2000) *Migrantenrecht*, 51.

106 See the discussion in Van Oers, De Hart and Groenendijk, "Country Report: The Netherlands" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/Netherlands.pdf, 10-11; Heijs, "Nederlandschap in de Nederlandse Koloniën: Regulering van immigratie vanuit de koloniën door nationaliteitsbeleid in Nederland" (1991) 12 *Recht der werkelijkheid*, 21-42.

107 See explicitly ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055. See similarly: Opinion of AG Tizzano in Joined Cases C-145/04 and C-300/04 *Spain v United Kingdom; Eman and Sevinger* [2006] E.C.R. I-7917, para. 144.

108 See Article 73 of the French Constitution, which states that the competence to regulate nationality is one that cannot be transferred to the overseas collectivities. For a detailed discussion, see Weil, Spire and Bertossi, "Country Report: France" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/France.pdf. For a historical overview and analysis of French nationality law, see Weil, *How to be* French*: nationality in the making since 1789* (Durham, Duke University Press, 2008), 438 pp.

nationals, including those settled in the OCTs, are Union citizens.[109] This has the same consequences under Union law as with regard to Dutch nationals.[110]

Interestingly, on the basis of the explicit authorisation in Article 77 of the French Constitution "New Caledonia Citizenship" was established. This status is complementary to French citizenship[111] and can only be acquired by French nationals who fulfil certain conditions, mainly that of having resided for ten years in New Caledonia.[112] New Caledonia may restrict certain rights to New Caledonian citizens, in particular the right to vote in local elections.[113] It can be wondered whether such arrangements, which effectively exclude non-Caledonian French citizens and other Union citizens from enjoying these rights, are permissible under the provisions on Union citizenship and Article 18 TFEU in particular.[114] This is certainly an interesting issue that will need to be examined more closely by the Union institutions in the near future. Be that as it may, the existence of a regional New Caledonian citizenship and the validity of the accompanying arrangements are not relevant for the analysis in this chapter since all New Caledonian citizens necessarily hold the French nationality and are, therefore, *prima facie*, Union citizens.

3. Denmark

Like the Kingdom of the Netherlands and the French Republic, the Kingdom of Denmark has a system of one single nationality, which is acquired by having a sufficiently close connection with any part of Denmark, including Greenland and the Faeroe Islands.[115] Applying Article 20(1) TFEU, this should have as a consequence that all Danish nationals, including those settled in Greenland and the Faeroe Islands, are to be considered Union citizens.[116] However, a protocol to the treaty of accession of Denmark to the European

---

109 Ziller, "L'association des pays et territoires d'outre-mer à la communauté européenne" (2002) *RFAP*, 131.

110 See under II.B.1., *supra*.

111 See the discussion in Custos, "New Caledonia, a Case of Shared Sovereignty within the French Republic: Appearance or Reality?**"** **(**2007) 13 *E.P.L.*, 97-132; Gohin, "La citoyennete dans l'outre-mer français" (2002) *R.F.D.A.P.*, 69-82.

112 See Articles 4 and 188 of Loi organique n°99-209 du 19 mars 1999 relative à la Nouvelle-Calédonie.

113 Under Article 24 of the organic law of 19 March 1999 (see previous footnote), New Caledonia may, furthermore, restrict access to certain professions to New Caledonia citizens. So far, it appears, no such arrangements are in place. See Faberon, "La Nouvelle-Calédonie et l'Union européenne", in Tesoka and Ziller (eds), *Union européenne et outre-mers: Unis dans leur diversiré* (Aix-en-Provence, Presses universitaires d'Aix-Marseille, 2008), 286 (cited by Kochenov (see following footnote), at 318).

114 See on that issue the very interesting article by Kochenov: Kochenov, "Regional Citizenships and EU Law: the Case of the Aland Islands and New Caledonia" (2010) 35 *E.L. Rev.*, 307-325 (the author concludes that the present nationality requirements in place in New Caledonia, in particular the fact that only French nationals can become New Caledonian citizens, are illegal under the principle of non-discrimination of Union citizens).

115 For a discussion of Danish nationality law, see Ersbøll, "Denmark", in R. Bauböck, E. Ersbøll, K. Groenendijk and H. Waldrauch (eds.), *Acquisition and loss of nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses*, (Amsterdam, Amsterdam University Press, 2006), 105-147.

116 See the discussion in Ziller, "The European Union and the Territorial scope of European Territories" (2007) 38 *Vict. U. Wellington L. Rev.*, 55; Ziller, "Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories", in De Búrca and Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?*

Communities[117] stipulates that Danish nationals residing in the Faeroe Islands are not to be considered as Danish nationals within the meaning of the treaties.[118] Hence, Danish people living in the Faeroe Islands are not Union citizens (see Article 20(1) TFEU).[119] The Protocol does not affect the status of other Member State nationals resident on the Faeroe Islands: they remain Union citizens. In conclusion, all Danish nationals are to be considered Union citizens, except those resident in the Faeroe Islands. For example: a Danish national resident in the Faeroe Islands who moves his residence to Greenland, is to be considered a Union citizen.

4. The United Kingdom

a) Different categories of British nationals: overview

British nationality laws are probably the most complex of any Member State. Unlike what is the case in most other Member States, different categories of British nationality exist, to which different sets of rights and duties are attached. These laws have, moreover, been changed substantially over time.[120] The current legislation can only be understood in the

(Oxford and Portland, Hart Publishing, 2000), 118 *et seq.*; Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 1455.

117 Protocol (No 2) on the Faroe Islands, annexed to the Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic the Italian Republic, The Grand Duchy of Luxembourg, the Kingdom of the Netherlands (Member States of the European Communities), The Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, [1972] O.J. L73/163, Article 4.

118 The protocol states that Danish nationals resident in the Faeroe Islands shall be considered to be nationals of a Member State within the meaning of the original Treaties only from the date on which those original Treaties become applicable to those Islands. The Treaties never became applicable to the Faeroe Islands, which has for a consequence that Danish nationals resident on the Faeroe Islands are not to be considered as Danish nationals for EU purposes. The same idea was reiterated in respect of the (rejected) EU Constitution: Article 7 of Protocol (No 8) annexed to the EU Constitution on the Treaties and Acts of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, of the Hellenic Republic, of the Kingdom of Spain and the Portuguese Republic, and of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, [2004] O.J. C310/267).

119 De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 9. This is different only for those Danish nationals resident in the Faeroe Islands which possess the nationality of another Member State. They will, by virtue of this latter nationality, have the status of Union citizen. Kochenov has argued, in the light of the ECJ's holding in *Eman and Sevinger* that Union citizenship does not have a territorial logic (see the discussion*, infra*), that restrictions of Union citizenship based on residence are not valid under Part Two of the TFEU (Kochenov, "The Puzzle of Citizenship and Territory in the EU: On European Rights Overseas" (2010) 17 *MJ,* 236). I submit that, while Kochenov is right on the fact that the protocol diverges from Part Two of the TFEU, such is not necessarily enough to question its validity, given that protocols have the same legal force as the treaty to which they are appended.

120 See also the discussion in Sawyer, "Country Report: United Kingdom" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/United%20Kingdom.pdf; Dumett, "United Kingdom", in . Bauböck, E. Ersbøll, K. Groenendijk and H. Waldrauch (eds.), *Acquisition and loss of nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses*, (Amsterdam, Amsterdam University Press, 2006), 551-580; Hansen, "From Subjects to Citizens: Immigration and Nationality Law in the United Kingdom", in Hansen and Weil

light of past legislation. It is important therefore to give a brief overview of the historical evolution of British nationality law, in particular with regard to the legal status of nationals of the overseas territories.

i) British Nationality Act 1948

Before 1948, all Commonwealth countries[121] had a single nationality status: "British subject" status. This was changed with the introduction of the British Nationality Act 1948[122], which introduced the new status of "citizen of the United Kingdom and Colonies", consisting of all those British subjects who had a close relationship (either through birth or descent) with the United Kingdom and its remaining colonies. Each other Commonwealth country[123] also established its own citizenship laws. As a result, the concept of "British subject"[124] covered three categories of citizens: "citizens of the United Kingdom and Colonies", in addition to "citizens of the independent Commonwealth countries" and "British subjects without citizenship", the latter category consisting of persons liable to become citizens of an emerging independent Commonwealth country on the coming into force of that country's citizenship law.[125] If that did not occur, such persons would then acquire citizenship of the United Kingdom and Colonies.

ii) Immigration Act 1971

The Immigration Act 1971[126] introduced the concept of "partiality" or "right of abode in the UK". Persons with the right of abode in the UK were defined as "patrials" (s 2(6)). Citizens of the United Kingdom and Colonies and other Commonwealth citizens had the right of abode in the UK only if they, their husband (for women), their parents or their grandparents were sufficiently connected to the United Kingdom and Islands.[127] The

(eds) *Towards a European Nationality: Citizenship, Immigration and Nationality Law in the EU* (Basingstoke, Palgrave, 2001), 138-139.

121 With the exception of the Irish Free State. Irish nationality was created with the 1922 Constitution of the Irish Free State (Article 3) and further regulated in the *Irish Nationality and Citizenship Act, 1935*.

122 For a discussion of this Act in great detail, see Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 169 *et seq*.

123 The Original Commonwealth countries were the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland (see the original text of the Statue of Westminster of 11 December 1931). See the Canadian Citizenship Act 1946; British Nationality and New Zealand Citizenship Act 1948; Nationality and Citizenship Act 1948 (No 83 of 1948) (for Australia); South African Citizenship Act 1949. Newfoundland never adopted the Westminster Statute but became a province of Canada in 1949. As a result, Newfoundlanders became Canadian citizens.

124 The Act provided that British subjects could also be known by the alternative title *Commonwealth citizen* and that the expression "British subject" and the expression "Commonwealth citizen" were to have the same meaning (Article 1(2) of the British Nationality Act 1948).

125 Opinion of AG Léger in Case C-192/99 *Kaur* [2000] E.C.R. I-1237, para. 8.

126 For a discussion of this Act in great detail, see Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 255 *et seq*.

127 Immigration Act 1971, s 2. With regard to "Citizens of the UK and Colonies", this connection mostly meant that they, or one of their parents or grandparents, were either born, adopted, registered or naturalised in either the UK or a colony. Residence in the UK, or – in the case of women – marriage to a partial, could in certain instances also qualify. With regard to other Commonwealth citizens, the connection with the UK had to be in one generation. Further, patrialty could only be claimed if the

consequence of having a right of abode in the UK was stated in the Act as being that one was "…free to live in, and to come and go into and from, the UK without let or hindrance, except such as may be required under and in accordance with this Act to enable their right to be established…". A non-patrial by contrast could only enter, and "…live, work and settle in the UK by permission and subject to such regulation and control…as is imposed by this Act…".

At the time of signing the Documents concerning the Accession to the European Communities, the United Kingdom Government made the following declaration on the definition of the term "nationals"[128]:

> "As to the United Kingdom of Great Britain and Northern Ireland, the terms nationals, nationals of Member States or nationals of Member States and overseas countries and territories, wherever used in the Treaty establishing the European Economic Community, the Treaty establishing the European Atomic Energy Community or the Treaty establishing the European Coal and Steel Community or in any of the Community acts deriving from those Treaties, are to be understood to refer to:
> (a) persons who are citizens of the United Kingdom and Colonies or British subjects not possessing that citizenship or the citizenship of any other Commonwealth country or territory, who, in either case, have the right of abode in the United Kingdom, and are therefore exempt from United Kingdom immigration control;
> (b) persons who are citizens of the United Kingdom and Colonies by birth or by registration or naturalization in Gibraltar, or whose father was so born, registered or naturalized".

It is obvious that this definition of "UK nationals" was centred on having a sufficient connection with either the UK and Islands (entailing the right of abode) or with Gibraltar. As a result, only a very limited number of Commonwealth citizens were to be considered Union citizens.

iii) British Nationality Act 1981

UK Nationality laws were radically changed again with the introduction of the British Nationality Act 1981.[129] The Act abolished the status of "citizenship of the United Kingdom and Colonies" and divided those who held that status into three categories:

(a) "British citizens", comprising those former citizens of the United Kingdom and Colonies with the right of abode in the United Kingdom (s 11(1)[130]).
(b) "British Dependent Territories citizens", comprising those former citizens of the United Kingdom and Colonies who did not have the right of abode but satisfied certain conditions concerning their connection with a British Dependent Territory deemed to confer on them immigration rights to that territory (s 23).

---

parent was actually born in the UK – the other methods of acquisition were insufficient. Residence in the UK could not, on its own, confer patrialty but, in the case of women, marriage to a partial could. See Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 257.

128 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals", [1972] O.J. L73/196. For a discussion of the possibility for the Member States to issue a declaration on the definition of national for Union purposes, and the consequences of such a declaration, see Chapter 2, under II.A.3., *supra*.

129 For a discussion of this Act in great detail, see Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 279 *et seq.*

130 Special cases are regulated by s 11 (2) and (3).

(c) "British overseas citizens", comprising all those former citizens of the United Kingdom and Colonies who did not become British citizens or British Dependent Territories citizens (s 26).

The Hong Kong Act 1985 added still another category of British nationality, known as "British National (Overseas)". This new category was available to Hong Kong British Dependent Territories citizens to apply for, in principle between 1 July 1987 and 1 July 1997.[131] This change was introduced because Hong Kong British Dependent Territories citizens would lose this status automatically on 1 July 1997, upon handover of Hong Kong to China.[132] British Nationals (Overseas) are Commonwealth citizens, but do not normally have a right of abode in the UK.

In 1982 the United Kingdom Government lodged a new declaration on the definition of the term "nationals",[133] in view of the entry into force of the British Nationality Act 1981. This new declaration, which was to replace the 1972 declaration as from 1 January 1983, was worded as follows:

> "As to the United Kingdom of Great Britain and Northern Ireland, the terms 'nationals', 'nationals of Member States or 'nationals of Member States and overseas countries and territories, wherever used in the Treaty establishing the European Economic Community, the Treaty establishing the European Atomic Energy Community or the Treaty establishing the European Coal and Steel Community or in any of the Community acts deriving from those Treaties, are to be understood to refer to:
> (a) British citizens;
> (b) Persons who are British subjects by virtue of Part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control;
> (c) British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar.
>
> The reference in Article 6 of the third Protocol to the Act of Accession of 22 January 1972, on the Channel Islands and the Isle of Man, to 'any citizen of the United Kingdom and Colonies` is to be understood as referring to 'any British citizen'."

This declaration will discussed in more detail below.[134]

iv) British Overseas Territories Act 2002

The regime introduced by the British Nationality Act 1981 underwent important changes with the introduction of the British Overseas Territories Act 2002.[135] The latter Act first of all changed the terminology of the 1981 Act: from British Dependent Territories to "British overseas territories" (s 1), and from British Dependent Territories citizenship to "British overseas territories citizenship" (s 2). The Act also extended British citizenship to

131 See Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 964 *et seq*.

132 On the international status of Hong Kong, see Johnson, "Hong Kong after 1997: a Free City?" (1997) 40 *German Yearbook of International Law*, 383-404.

133 New Declaration by the government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals", [1983] O.J. C23/1.

134 See under II.B.4.b., *infra*.

135 For a discussion of this Act in great detail, see Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 322 *et seq*.

all persons who were British overseas territories citizens before the commencement of the Act (21 May 2002),[136] except for those persons who were British overseas territories citizens by virtue only of a connection with the Sovereign Base Areas in Cyprus (s. 3). Furthermore, British overseas territories citizens were given the right to register as British citizens, with the same exception for persons who were British overseas territories citizens by virtue only of a connection with the Sovereign Base Areas in Cyprus (s. 4, inserting a new s. 4A in the British Nationality Act 1981). This right was introduced to allow a conversion also for those persons who acquired British overseas territories citizenship after 21 May 2002.

On the occasion of the signing of the Lisbon Treaty, the United Kingdom reiterated its 1982 declaration on the definition of the term "nationals", while bringing its terminology in accordance with the changes introduced by the British Overseas Territories Act 2002. The declaration of the United Kingdom annexed to the Treaty of Lisbon states[137]:

> "In respect of the Treaties and the Treaty establishing the European Atomic Energy Community, and in any of the acts deriving from those Treaties or continued in force by those Treaties, the United Kingdom reiterates the Declaration it made on 31 December 1982 on the definition of the term 'nationals' with the exception that the reference to 'British Dependent Territories Citizens' shall be read as meaning 'British overseas territories citizens'."

b) Consequences with regard to Union citizenship

The foregoing briefly sets out the relevant British nationality rules, together with the British declarations on the definition of nationals for the purposes of Union law. In the following I will try to determine with as much precision as possible which groups of British nationals should, on the basis of these Acts and declarations, be considered to be Union citizens. The analysis will focus on the status of British nationals settled in the different British overseas territories. For the sake of clarity, I will also try to determine with as much precision as possible which groups of British nationals should, conversely, not be considered to be Union citizens.

i) Union citizens

It appears from the UK declaration quoted above that three groups of British nationals are to be considered to be Union citizens. A first group is formed by the category of "British citizens". This group at present comprises (at least potentially) almost all British overseas territories citizens, as they either automatically became British citizens or have the right to register for British citizenship (cf. *supra* on s 3 and 4 of the British Overseas Territories Act 2002). As a consequence, almost all British nationals settled in British OCTs are nowadays to be considered as Union citizens. This is in sharp contrast with the period before the commencement of the British Overseas Territories Act 2002, when most British nationals settled in OCTs were excluded from the personal scope of Union citizenship.[138]

---

136 See British Overseas Territories Act 2002 (Commencement) Order 2002, s 2(a).

137 Declaration (No 63) by the United Kingdom of Great Britain and Northern Ireland on the definition of the term 'nationals', annexed to the Final Act to the Treaty of Lisbon, [2010] O.J. C83/358.

138 See Fransman *Fransman's British Nationality Law* (2nd ed.) (London, Edinburgh & Dublin, Butterworths, 1998), 36 *et seq.*

Special rules apply with regard to Channel Islanders and Manxmen. Channel Islanders and Manxmen are without any doubt British citizens,[139] and therefore Union citizens (Article 20(1) TFEU). However, they do not enjoy all the rights conferred by the Treaties on Union citizens. Most importantly, Protocol 3 to the Accession Treaty provides that they "shall not benefit from [Union] provisions relating to the free movement of persons and services".[140] At the time of the UK's accession, this was a reference to the provisions on the free movement of workers, the freedom of establishment and the freedom to provide services. However, since the introduction of the provisions on Union citizenship, it must most probably be read as a reference to the free movement rights laid down in Article 21 TFEU, of which the aforementioned rights are specific expressions.[141] As a consequence, Channel Islanders and Manxmen do not derive from the Treaties the right to go to another Member State in order to take up an economic activity there, nor for non-economic purposes, such as in order to study[142] in that other Member State.[143] Naturally, they may derive such rights under more flexible rules of national law. For instance, under UK law,[144] they enjoy the right of free movement within the UK, which enables them to study there, for example.

The definition of Manxmen or Channel Islander for the purposes of Union law can be found in the aforementioned Protocol No. 3. Article 6 provides that "in this protocol, Channel Islander or Manxman shall mean any citizen of the United Kingdom and colonies who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalized or registered in the island in question…". However, the Article 6 of

---

139 See s 50(2) of the British Nationality Act 1981, stipulating that, for the purposes of that act, the "United Kingdom" means Great Britain, Northern Ireland and the Islands, taken together. See also Protocol (No 3) on the Channel Islands and the Isle of Man, annexed to the Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic the Italian Republic, The Grand Duchy of Luxembourg, the Kingdom of the Netherlands (Member States of the European Communities), The Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, [1972] O.J. L73/164, Article 6: "in this protocol, Channel Islander or Manxman shall mean any citizen of the United Kingdom and colonies who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalized or registered in the island in question…". "Any citizen of the United Kingdom and colonies" should now be understood as referring to "any British citizen", as a consequence of the United Kingdom Declaration 1982 *in fine.* In a protocol to the (rejected) EU Constitution the wording was changed accordingly (see Article 13 of Protocol (No 8) annexed to the EU Constitution on the Treaties and Acts of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, of the Hellenic Republic, of the Kingdom of Spain and the Portuguese Republic, and of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, [2004] O.J. C310/267).

140 See, Article 2 of Protocol (No 3) (n. 96, *supra*). On this issue, see Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 97-98.

141 *See*, *e.g.*, ECJ, Case C-193/94 *Skanavi* [1996] E.C.R. I-929, § 22 (on the freedom of establishment); ECJ, Case C-100/01 *Oteiza Olazabal* [2002] E.C.R. I-10981, § 26 (on the free movement of workers); ECJ, Case C-208/05 *ITC* [2007] E.C.R. I-181, § 64 (on the freedom to provide services).

142 According to the ECJ, studying in another Member State is an exercise of the right to free movement for citizens of the Union. See *e.g.* ECJ, Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] E.C.R. I-9161.

143 This is confirmed in a recent report from the States of Jersey on the "Status of Channel Islanders in the European Union", *available at* http://www.statesassembly.gov.je/documents/reports/45051-30164-1222008.htm.

144 See the Immigration Act 1971. More broadly, Manxmen and Channel islanders enjoy the right of free movement in the Common Travel Area between the Republic of Ireland, the United Kingdom, the Isle of Man, Jersey and Guernsey.

Protocol No 3 specifies that "such a person shall not be regarded, for the purposes of that protocol, as a Channel Islander or Manxman if he, a parent or a grandparent was born, adopted, naturalized or registered in the United Kingdom, nor if he has at any time been ordinarily resident in the United Kingdom for five years". It follows that only a limited number of the British citizens resident in the Channel Islands or Island of Man will be considered Manxmen or Channel Islanders for EU purposes, and thus not be entitled to certain citizenship rights under Union law. The latter form a particular category of British citizens. For practical purposes, this group of British citizens is set apart by a special mention in their passport, stating: "Holder is not entitled to benefit from European [Union] provisions relating to employment or establishment". However, as is clear from the foregoing, they could "convert" to become a "regular" British citizen after an ordinary residence of 5 years in the UK.[145] An interesting question is whether they can also convert themselves by residing in the territory of another Member State, including Ireland in particular. In respect of any other UK citizen of the Union, a similar rule could be said to amount to an obstacle to the exercise of free movement rights and could be considered to infringe Union law for this reason. Indeed, the rule would deter UK citizens from travelling to another Member State. However, this reasoning does not hold good, since the said group of Manxmen and Channel Islander does not enjoy the right to free movement in the first place. In principle, it is a matter for the UK, therefore, to decide whether residence in another Member State could also give entitlement to the status of full-blown Union citizen, through the British nationality rules. Such would in any event be advisable in the context of the EU, since, as the ECJ has consistently held, exceptions to the fundamental freedoms must be interpreted narrowly. The exclusion from the right to free movement could be seen as such an exception.

A second group is formed by those "persons who are British subjects by virtue of Part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control". "British subjects", as used in part IV of the 1981 Act,[146] comprises different categories of persons.[147] First of all, it includes a category that prior to the commencement of the Act was known as "British subjects without citizenship status"[148] (s 30(a)). It also includes women registered as British subjects under the British Nationality Act 1965 (s 30(b)) and citizens of the Republic of Ireland who were British subjects before the 1948 Act came into force and who express (or have expressed) the wish to remain so (s 31). Only British subjects with the right of abode qualify as Union citizens. This does not concern a large number of individuals, because most British subjects appear not to enjoy this right.[149] Consequently, the second group is not of considerable numerical importance and its

---

145 Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 97-98, who adds that the words "at any time have been" indicate that an Islander once converted stays converted.

146 Prior to the commencement of the British Nationality Act 1981, "British Subject" was used as a synonym for "Commonwealth Citizen" (cf. Article 1(2) of the British Nationality Act 1948 and n. 124, *supra*). It has to be understood as such in Acts dating from prior to the commencement of the 1981 Act.

147 Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 646.

148 This category includes persons that never acquired the citizenship of a commonwealth country, nor became a "citizen of the UK and colonies" as foreseen by s 13(2) of the BNA 1948 (as explained *supra*, under the heading "British Nationality Act 1948"). See in detail: Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 236 *et seq.*

149 Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 308-309.

importance will in any event further decline as the British subject status is destined to disappear.[150] Besides, it is important to note that any British subject, other than the last category mentioned, immediately loses this status once he acquires any other citizenship or nationality whatever (s 35). Moreover, British subjects can under certain circumstances register for British citizenship (s 4B BNA 1981). In that case they fall under the first group described above.

The last group consists of British overseas territories citizens who acquire their citizenship from a connection with Gibraltar. Persons belonging to this group will be Union citizens, even if they do not possess British citizenship. This is important, for instance, for persons who on or after 21 May 2002 register or naturalise in Gibraltar as a British overseas territories citizen.[151]

ii) Not Union citizens

It clearly appears from the foregoing that almost all British nationals living in the OCTs are at present Union citizens. This is in sharp contrast with the period before the commencement of the British Overseas Territories Act 2002, when most British nationals settled in OCTs were excluded from the personal scope of Union citizenship. Still, it must be pointed out that the situation in the UK differs from that in the three other Member States discussed above (the Kingdom of the Netherlands, France and Denmark[152]) in that not all British OCT nationals will possess Union citizenship. This is related to the fact that British nationality law recognises different categories of British nationals. Persons belonging to some of these categories will, under certain circumstances, still fall outside the three groups mentioned above and will in consequence not be considered Union citizens.

This is the case, in principle, for certain categories of "British overseas territories citizens", "British Overseas citizens", "British protected persons" [153] and "British Nationals (Overseas)".[154] Persons belonging to the last three groups are not automatically British citizens, although they have the possibility to register for British citizenship.[155] Only those individuals who do not so register do not enjoy Union citizenship status. In practice, this concerns only a limited number of persons. As far as the first group is concerned, it is important to stress in this context that the status of "British overseas territories citizens"

150 Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 646.

151 Given that such a registration or naturalisation does not automatically entail Union citizenship (see Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 1472).

152 Leaving aside the special situation of Danish nationals resident in the Faeroe Islands.

153 See s 38 of the British Nationality Act 1981.

154 The existence of historic categories of citizenship, such as "British Overseas Citizenship", which do not give entitlement to British or Union citizenship remains a source of controversy. This is perfectly illustrated by recent reports about Malaysian nationals residing in the UK who gave up their Malaysian nationality in order to obtain a British Overseas Citizens passport and consequently found themselves to be stateless. See Dugan, "Immigration rules leave stateless Malaysians in limbo" (13 March 2011) *The Independent*, *available at* http://www.independent.co.uk/news/uk/politics/immigration-rules-leave-stateless-malaysians-in-limbo-2240532.html.

155 See, in detail, the relevant sections of Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), Chapter 17.

was not abolished. The great majority of British overseas territories citizens will have become British citizens indeed, but this does not make the former category redundant. First of all, persons who are "British overseas territories citizens" by virtue only of a connection with the Sovereign Base Areas in Cyprus will not have become British citizens[156] and, as a consequence, are not Union citizens. Furthermore, it should be borne in mind that British citizenship is conferred on the other British overseas territories citizens *in addition to* the status they possess. The consequence of this is that the persons in question may issue a declaration of renunciation in order to divest themselves of British citizenship. If this happens, they are exclusively British overseas territories citizens, not possessing Union citizenship.[157] Lastly, as set out above, persons who acquired British overseas territories citizenship after 21 May 2002 will not automatically have become British citizens. They can only apply to be registered as British citizens. Registration is at the discretion of the Secretary of State (s. 4, inserting a new s. 4A in the British Nationality Act 1981).[158]

III CITIZENSHIP RIGHTS

A. Introduction: Union citizenship and the particular legal status of the OCTs

An interesting aspect about any analysis of the rights associated with Union citizenship in relation to OCT nationals[159] is that they involve a rather complicated interplay between the territorial scope of application and the personal scope of application of Union law.[160] On the one hand, OCT nationals, as Union citizens, fall squarely within the personal scope of application of Union citizenship. On the other hand, the OCTs do not seem to fall within the territorial scope of the Treaties as a whole, since only limited parts of the Treaties are applicable to the OCTs. I will analyse these two propositions in some more detail before embarking upon an analysis of how these different scopes play out in relation to the exercise by OCT nationals of two of their most fundamental rights, namely the right to free movement and electoral rights.

1. OCT nationals are Union citizens

It clearly follows from the discussion above that most citizens resident in the OCTs have the nationality of their Member State. This is the case for all Danish, Dutch and French

156 Cf. *supra* on s 3 and 4 of the British Overseas Territories Act 2002.

157 See s 4 (2) of the British Overseas Territories Act 2002; De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF, 7.

158 For the sake of completeness I also mention a last category of British overseas territories citizens potentially not possessing British citizenship: the Ilois, covered by s 6(3) of the British Overseas Territories Act 2002. Given that "Ilois" is a term which some consider to be offensive, the terms "Chagossians" or "Chagos Islanders" are often used. See the discussion in Fransman *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 325-326.

159 Throughout my analysis, I will use the expression "OCT nationals" as referring to "those persons who are nationals of Denmark, the Netherlands, the UK or France through a connection with an OCT of one of these Member States and who are Union citizens because they have the nationality of that Member State".

160 On the personal application of Union law, see already the "classic" article of Bleckmann, "The Personal Jurisdiction of the European Community" (1980) 17 *CML Rev.*, 467-485.

overseas nationals and, since 2002, for most British nationals living in the British overseas territories. As I have already stated higher, this has for a logical consequence under Article 20(1) TFEU that these nationals are Union citizens and, hence, enjoy the rights associated with that status.[161] This has been explicitly confirmed by the ECJ in the *Eman and Sevinger* case, which I will discuss in more detail below.[162] In that case, the ECJ famously stated:

> "…persons who possess the nationality of a Member State and who reside or live in a territory which is one of the OCTs referred to in [Article 355(2) TFEU] may rely on the rights conferred on citizens of the Union in Part Two of the [TFEU]".

This point of view is confirmed in the 2008 Commission Green Paper[163] and was already articulated in a Communication of the Commission of 1999, which states:

> "…nationals of the OCTs also posses the nationality of the Member States to which they are linked and are therefore citizens of the Union. As such, other provisions of the [Treaties] apply to them as individual citizens, notably those concerning the free movement of persons on the [Union] territory."[164]

The view that OCT nationals are Union citizens is widely accepted nowadays, especially after the explicit endorsement of this view by the ECJ. It must be remarked, however, that this issue has long been unclear.[165] In the past, some authors have put forward various arguments in support of the view that OCT nationals, despite having the nationality of a Member State, do not enjoy all of the rights associated with Union citizenship, such as the right of free movement in particular.[166] This brought the said authors to submit that OCT

---

161 They are also subject to the duties associated with that status (Article 20(2) TFEU states that "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties). This is only important from the theoretical point of view, since at present Union citizenship does not seem to be accompanied by any concrete duties. See Nic Shuibhne, "The Resilience of EU Market Citizenship " (2010) 47 *CML Rev.*, 1627.

162 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 29. See similarly: Opinion of AG Tizzano in Joined Cases C-145/04 and C-300/04 *Spain v United Kingdom; Eman and Sevinger* [2006] E.C.R. I-7917, para. 144. For a discussion, see the case notes by Shaw in (2008) 4 *EuConst,* 162-186; Besselink in (2008) 45 *CML Rev.,* 787-813 en in (2007) *N.T.E.R.,* 64-71; Claes in (2007) *SEW,* 216-221, Dawes in (2006) 3 *R.D.U.E,* 707-712 and Hervouët in (2006) *R.A.E.-L.A.E.,* 565-570.

163 Commission Green Paper on Future relations between the EU and the Overseas Countries and Territories, COM(2008) 383 final, at 6 (the Green Paper does, however, make an exception for the right to free movement for workers, which is stated to be not applicable to OCT nationals; see the discussion, *infra*, under III.B).

164 Communication from the Commission of 20 May 1999 on the status of OCTs associated with the EC and options for 'OCT2000', COM(1999)163 final, 40.

165 The existence of this uncertainty perhaps explains the rather confused phrasing of the questions by the referring court in the *Eman and Sevinger* case. The AG explicitly denounced this bad phrasing in his opinion: Opinion of AG Tizzano in Joined Cases C-145/04 and C-300/04 *Spain v United Kingdom; Eman and Sevinger* [2006] E.C.R. I-7917, paras 38 *et seq.*

166 See, *e.g.*, Staples, "Wie is burger van de Unie?" (2001) *N.T.E.R.*, 11-12; Hall *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 25 *et seq.*; Mortelmans and Temmink, "Het vrije personenverkeer tussen de Nederlandse Antillen en Aruba", in *Met het oog op Europa; De Europese Gemeenschap* (Willemstad, Stichting Tijdschrift voor Antilliaans Recht – Justicia, 1991), 62-64. See also the discussion in De Groot, "The Relationship between the Nationality of the Member States of the European Union and European Citizenship", in La Torre (ed.), *European Citizenship: An Institutional Challenge* (The Hague, Kluwer Law International, 1998), 129-134 (the author explains and rejects the different arguments in favour of an exclusion of OCT nationals from the benefits of Union citizenship).

nationals are not Union citizens.[167] Some authors even went as far as stating that OCT nationals are to be considered third country nationals.[168] In this connection, different criteria were proposed to distinguish OCT nationals from other Member State nationals, such as for instance the criterion of habitual residence in the OCTs or the criterion of having acquired Member State nationality through a particular connection with one of the OCTs.

I believe that much of the argument for the exclusion of OCT nationals from the benefit of the rights associated with Union citizenship can be traced back to a failure to make the conceptual distinction between the territorial scope and personal scope of the citizenship provisions. OCT nationals do have the nationality of a Member State and this is, under Article 20(1) TFEU, the only condition for having Union citizenship. Accordingly, they must necessarily enjoy the rights associated with this status. It cannot be objected that, since Part Two on Non-discrimination and Citizenship of the Union does not apply *ratione loci* to the OCTs, Member State nationals resident in the OCTs or having a particular connection with the OCTs cannot be considered as Union citizens. As Kochenov has put it, Union citizenship does not know any "territorial logic".[169] Union law simply leaves no room for making the enjoyment of the status of Union citizen dependent on an additional condition besides the possession of Member State nationality, for instance a condition of "not having one's habitual residence in one of the OCTs".[170] Given the dependence of Union citizenship on Member State nationality, a denial of Union citizenship to nationals resident in the OCTs or having a particular connection with the OCTs would be possible only if they would be denied the nationality of a Member State or if the associated Member State[171] would make a declaration to this effect.[172] This is the only point of view which, in my view, is in accordance with Article 20(1) TFEU. For this reason, the judgment in *Eman and Sevinger* can be much welcomed for the clarification it has brought on this issue of longstanding uncertainty.

2. The Treaties are not fully applicable to the OCTs

As explained above, Article 355(2) TFEU provides that the special arrangements set out in Part Four of the TFEU apply to the OCTs mentioned in Annex II to the Treaties. This provision is traditionally understood as saying that *only* the provisions of Part Four of the

---

167 It must be pointed out, however, that much of the argumentation was already developed before the introduction of Union citizenship, namely in relation to the view that OCT nationals did not enjoy free movement rights unlike other Member State nationals (See, *e.g.*, Greenwood, "Nationality and the Limits of the Free Movement of Persons in Community Law" (1987) *YbEL*, 189; Hartley, *EEC immigration law* (Amsterdam, North-Holland, 1978), 60; Edens and Patijn, "The Scope of the EEC System of Free Movement of Workers" (1972) *CML Rev.*, 322.

168 Staples, "Wie is burger van de Unie?" (2001) *N.T.E.R.*, 112. As pointed out, this article was, of course, written years before the judgment in *Eman and Sevinger*.

169 Kochenov, "The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community" (2009) *L.I.E.I.*, 240.

170 See, in this regard, the discussion of the *Micheletti* judgment (ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239) and its consequences in Chapter 2, under III.A.

171 I will use the expression "associated Member State" to refer to the Member State to which a particular OCT belongs. For instance, in relation to Greenland, Denmark is the associated Member State.

172 As pointed out above, the United Kingdom is the only Member State possessing OCTs that has made such a declaration. This declaration is without consequences for OCT nationals, as defined for the purposes of this analysis.

Treaties apply to the OCTs. This "orthodox" approach finds strong support in the case law of the Union Courts. In *Leplat* the ECJ famously stated that, failing express reference, the general provisions of the Treaties do not apply to the OCTs.[173] It has consistently repeated this in later case law, including in the *Eman and Sevinger* case.[174] The ECJ has also held that OCTs, since they remain outside the sphere of (full) application of the Treaties, are, as regards the Union, "in the same situation as non-member Countries".[175] On this line of reasoning it was held for example that the free movement of goods between the OCTs and the Union does not exist without restriction,[176] and that certain aspects of the WTO agreement and its annexes fall outside the scope of Union law insofar as it applies to the OCTs.[177] Further support for this approach can be found in the preamble to the OCT decision[178] and in some Commission documents. The Commission's 2008 Green Paper, for instance, states that: "…the provisions of the [Treaties] in principle do not apply to the OCTs, except Part Four of the [TFEU], which deals exclusively with the OCT-EC association."[179]

Below I will explain, specifically in relation to the rights associated with Union citizenship, that there are good arguments to consider this orthodox approach to be outdated. At this point of my analysis it seems useful to look at the provisions of Part Four of the TFEU in some more detail first.[180]

Part Four of the TFEU on "the Association of the Overseas Countries and Territories" consists of seven Treaty provisions (Articles 198-204 TFEU). The basic principles and objectives of the association of the OCTs are stated in Articles 198 and 199 TFEU. The main purpose stated is to "promote the economic and social development of the [OCTs] and to establish close economic relations between them and the Union as a whole" (Article 198, second para., TFEU).[181] One of the specific objectives of the association is the freedom of establishment between the Member States and the OCTs (Article 199(5) TFEU; see the discussion, *infra*). Articles 200 and 201 TFEU lay down provisions on the

---

173 ECJ, Case C-260/90 *Leplat* [1992] E.C.R. I-643, para. 10.

174 ECJ, Case C-181/97 *van der Kooy* [1999] E.C.R. I-483, para. 37; ECJ, Case C-106/97 *Dutch Antillian Dairy Industry* [1999] E.C.R. I-5983, paras 40 and 42; ECJ, Case C-110/97 *Netherlands v Council* [2001] E.C.R. I-8763, para. 49; ECJ, Case C-110/97 *Netherlands v Council* [2001] E.C.R. I-8763, para. 61; ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 46; ECJ, Case C-384/09 *Prunus* [2011] E.C.R. nyr., para. 29.

175 ECJ, Opinion 1/78 *International Agreement on Natural Rubber* [1979] E.C.R. 2871, para. 62. Repeated in ECJ, Opinion 1/94 *Agreement establishing the World Trade Organisation* [1994] E.C.R. I-5267, para. 17; ECJ, Case C-17/98 *Emesa Sugar* [2000] E.C.R. I-675, para. 29.

176 ECJ, Case C-390/95 P *Antillean Rice Mills* [1999] E.C.R. I-769, para. 36; ECJ, Case C-17/98 *Emesa Sugar* [2000] E.C.R. I-675, para. 29.

177 ECJ, Opinion 1/94 *Agreement establishing the World Trade Organisation* [1994] E.C.R. I-5267, paras 16-17.

178 Recital 16 in the preamble to Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community, [2001] O.J. L314/5 provides: "The general provisions of the Treaty and legislation derived thereunder do not automatically apply to the OCTs, barring express provisions to the contrary".

179 Commission Green Paper on Future relations between the EU and the Overseas Countries and Territories, COM(2008) 383 final, 3.

180 For more detailed discussions, see Kochenov, "Substantive and Procedural issues in the Application of European Law in the Overseas Possessions of European Union Member States" (2008-2009) 17 *Mich. St. J. Int'l L.*, 245-247 and the references cited; Faberon and Ziller *Droit des collectivités d'outre-mer* (Paris, LGDJ, 2007), 239-281.

181 This is also confirmed by Declaration (No 36) on the Overseas Countries and Territories, annexed to the Treaty of Amsterdam, [1997] O.J. C340/138.

free movement of goods between the OCTs and the Member States.[182] The most important principle is that Member States may not levy customs duties on imports from the OCTS, whereas, conversely, the OCTs may, under certain conditions, levy custom duties on imports from the Member States as long as they do not discriminate between Member States. A key provision to my analysis will be Article 202 TFEU, which provides for the adoption of rules on the free movement of workers (see the discussion, *infra*). Article 203 TFEU provides for the adoption by the Council of provisions regarding the detailed rules and the procedure for the association of the OCTs with the Union. They can be found in the consecutive OCT-decisions (see *infra*). Finally, Article 204 TFEU refers to the specific legal regime for Greenland, as set out in the Protocol on special arrangements for Greenland (see the discussion under II.A.3., *supra*).

More detailed rules can be found in Council Decision 2001/822, which is also known as the "Overseas Association Decision" or the "OCT Decision",[183] and the provisions adopted thereunder.[184] The Decision contains general provisions on the association, but also sets out detailed provisions on the areas of OCT-EU cooperation and the instruments for that cooperation. The two main instruments of cooperation are development finance cooperation and economic and trade cooperation. Council Decision 2001/822 will be applicable until 31 December 2013, two years longer than originally foreseen.[185] Its duration was extended in order to make it coincide with the duration of the 10th European Development Fund (EDF).[186]

---

182 For more details, see Tryfonidou, "The Overseas Application of the Customs Duties Provisions of the TFEU", in in D. Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 221-244; Tryfonidou, "The Free Movement of Goods, the Overseas Countries and Territories and the EU's Outermost Regions: Some Problematic Aspects" (2010) 37 *LIEI,* 317-338; Dekker, "The Ambit of the Free Movement of Goods Under the Association of Overseas Countries and Territories (Case Comment)" (1998) *E.L. Rev.*, 272-278; Dekker, "Vrijwaringsmaatregelen in het goederenverkeer tussen de LGO en de Europese Gemeenschap" (1996) *Tijdschrift voor Antilliaans Recht,* 148-161; Martha, "Toepassing van het gemeenschappelijk origine begrip op het goederenverkeer met de landen en gebieden overzee" (1991) *S.E.W*, 298-319. See also the special rules laid down in Protocol (No 31) concerning imports into the European Union of petroleum products refined in the Netherlands Antilles, [2010] O.J. C83/315.

183 Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community, [2001] O.J. L314/5, as amended by Council Decision 2007/249/EC of 19 March 2007 amending Decision 2001/822/EC on the association of the overseas countries and territories with the European Community, [2007] O.J. L109/33. For a discussion, see Ziller, "L'association des pays et territoires d'outre-mer à la communauté européenne" (2002) *RFAP*, 127-136. For the previous Council decision, see Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community, [1991] O.J. L263/1.

184 In particular, Commission Regulation (EC) No 2304/2002 of 20 December 2002 implementing Council Decision 2001/822/EC on the association of the overseas countries and territories with the European Community, [2002] O.J. L348/82, as amended by Commission Regulation (EC) No 1424/2007 of 4 December 2007 amending Regulation (EC) No 2304/2002 implementing Council Decision 2001/822/EC on the association of the overseas countries and territories with the European Community and allocating the indicative amounts under the 10th European Development Fund, [2007] O.J. L317/38.

185 See Article 63 of the OCT Decision, as amended by Council Decision 2007/249.

186 See the Internal Agreement between the Representatives of the Governments of the Member States, meeting within the Council, on the financing of Community aid under the multiannual financial framework for the period 2008 to 2013 in accordance with the ACP-EC Partnership Agreement and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the EC Treaty applies, [2006] O.J. L247/32 and Council Regulation (EC) No 215/2008 of 18

In order to prepare its proposal for a new OCT Decision, the Commission has launched a Green Paper[187] to consult with interested parties. On the basis of those consultations, the Commission has set out its standpoints on the essential elements to be included in the new OCT decision.[188] It is clear from these documents that the Commission proposes a new approach to the OCT-EU association, moving away from classic "development" approach and focusing instead on the OCTs' competitiveness and resilience.[189] Very important in this connection is that the Commission proposes that the future association should encourage and assist all OCTs to "upgrade" local legislation in relevant areas to the level of Union *acquis.*[190] In this sense, we see a trend towards further integration of the OCTs in the European construction, by strengthening the reciprocity of the OCT-EU partnership and encouraging wider application of Union law in the OCTs.[191]

3. Interaction between provisions on Union citizenship and provisions on OCTs

On the basis of the foregoing, two approaches can be distinguished with regard to the possibility for OCT nationals to exercise their citizenship rights in the OCTs. A first, traditional approach, holds that this exercise is not possible, since only the provisions of Part Four of the TFEU apply to the OCTs and since the provisions on Union citizenship are not amongst these. A second, more dynamic approach holds that the traditional assumption that only the provisions of Part Four of the TFEU apply to the OCTs is no longer valid, in particular in view of the fact that OCT nationals are Union citizens. In this connection, different arguments are presented in favour of the possibility of exercising citizenship rights also in the territory of the OCTs and between OCTs an. I will now briefly analyse both approaches in general, before considering them in relation to the two citizenship rights considered below in detail.

a) Traditional approach

This approach starts from the observation that, while OCT nationals indisputably have the status of Union citizen, the provisions of Part Two of the TFEU on Union citizenship are not amongst the Treaty provisions applicable *ratione loci* in the OCTs. The provisions of Part Four of the TFEU, which are indubitably applicable in the OCTs, do not refer to part Two of the TFEU and only confer limited rights on individuals, namely in relation to the

February 2008 on the Financial Regulation applicable to the 10th European Development Fund, [2008] O.J. L78/1.

187 Commission Green Paper on Future relations between the EU and the Overseas Countries and Territories, COM(2008) 383 final.

188 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 November 2009 - Elements for a new partnership between the EU and the overseas countries and territories (OCTs) COM(2009) 623 final.

189 For a discussion, see Custos, "Implications of the European Integration for the Overseas", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 112 *et seq.*

190 *Ibid*, at 7.

191 See on this point also Kochenov, Bröring and Hoogers, "Staatsrechtelijke consequenties van de toekenning van een UPG-status aan Aruba en de Eilandgebieden van de huidige Nederlandse Antillen" (2010) 26 *Tijdschrift voor Antilliaans Recht - Justicia*, 20-22.

free movement of workers and the freedom of establishment. *Prima facie* it can be inferred from this that OCT nationals cannot exercise the rights associated with Union citizenship in the OCTs. In this connection, it is submitted that the references to "Member States" in the provisions on Union citizenship do not cover the territories of the OCTs.[192] Accordingly, the citizenship rights laid down in Article 21 TFEU (right to free movement), Article 22 TFEU (right to participate in municipal and European Parliamentary elections) and Article 24, second and third para., TFEU (right to petition the European Parliament and to apply to the Ombudsman[193]) can, on the basis of that reading of Treaties, not be exercised in the OCTs. A particular case is the right to diplomatic protection, which is applicable in the territory of a third country in which the Member State of which the Union citizen is a national is not represented (Article 23 TFEU). This right could be applicable in the OCTs if they could be considered as "third countries" for the application of this provision. However, it would be rather absurd to consider OCTs to be a third country as far as diplomatic protection is concerned. After all, they fall under the jurisdiction of one of the Member States.

b) Dynamic approach

The second approach rests on the view that the traditional assumption that only Part Four of the TFEU applies to the OCTs must be rejected. This view has been most strongly advocated by Ziller (sometimes writing together with Faberon)[194] and has, more recently, been taken up by Kochenov.[195] Both authors have advanced several arguments in support of the wider applicability of the Treaties in the OCTs. Some of these arguments relate to the applicability of Treaty provisions in general to the OCTs; others relate more

---

192 Remark in this regard that the ECJ has very clearly stated that OCTs cannot be considered to be "Member States" for the purposes of Article 263 TFEU (see ECJ, Case C-142/00 P, *Commission v Nederlandse Antillen,*[2003] E.C.R. I-3483. For an analysis, see Lenaerts and Cambien, "Regions and the European Courts: Giving Shape to the Regional Dimension of Member States" (2010) 35 *E.L. Rev.*610-620.

193 Article 23, second and third para, TFEU refer to Articles 227 and 228 TFEU which, in turn embody a condition of residence in one of the Member States.

194 See Ziller, "Outermost Regions, Overseas Countries and Territories Others after the Entry into Force of the Lisbon Treaty", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 76-78; Ziller, "Champ d'application du droit communautaire" (Paris, Editions du Juris-Classeur) fasc. 470 *Juris-Classeur Europe, available at* www.lexisnexis.com; Ziller, "The European Union and the Territorial scope of European Territories" (2007) 38 *Vict. U. Wellington L. Rev.*, 51-62; Faberon and Ziller *Droit des collectivités d'outre-mer* (Paris, LGDJ, 2007), 256 *et seq.*; Ziller, "L'association des pays et territoires d'outre-mer à la communauté européenne" (2002) *RFAP*, 127-136; Ziller, "Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories", in De Búrca and Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?* (Oxford and Portland, Hart Publishing, 2000), 113-131.

195 Kochenov, "The impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community" (2009) 36 *LIEI*, 239-256; Kochenov, "Substantive and Procedural issues in the Application of European Law in the Overseas Possessions of European Union Member States" (2008-2009) 17 *Mich. St. J. Int'l L.*, 248-256. The point is also made in Kochenov, Bröring and Hoogers, "Staatsrechtelijke consequenties van de toekenning van een UPG-status aan Aruba en de Eilandgebieden van de huidige Nederlandse Antillen" (2010) 26 *Tijdschrift voor Antilliaans Recht - Justicia*, 17-18 and Bröring, Kochenov, Hoogers and Jans *Schurende rechtsordes; Over de Europese Unie, het Koninkrijk en zijn Caribische gebieden* (Groningen, Europa Law Publishing, 2008), 109-119.

specifically to the applicability of the provisions on Union citizenship to the OCTs. In the following I will set out the different arguments, and consider their merits.

i) General Treaty provisions

Ziller has forcefully argued that the majority of the Treaty provisions are applicable to the OCTs.[196] He maintains that only the provisions of Part Three of the TFEU ("Union Policies and Internal Actions"), and the provisions relating to the Internal Market in particular, are not applicable to the OCTs.[197] The other Treaty provisions, by contrast, do apply to the OCTs, in particular those of Parts One ("Principles"), Two ("Non-discrimination and Citizenship of the Union"), Six ("Institutional and Financial Provisions") and Seven ("General and Final Provisions"),[198] unless Part Four of the TFEU provides for exceptions in this regard.[199] Ziller has put forward three arguments to support his view.

A first argument is that the practice of the Union legislator has not always been consistent.[200] Some legislative acts expressly exclude the OCTs from their scope of application, while for other acts the Union legislator apparently does not find it necessary to do so. For the latter category of acts, this is probably based on the assumption that it is clear from the structure of the Treaties already that Union law is not applicable to the OCTs, except in those special cases based on Part Four of the TFEU. A good example of the first category is Regulation 2913/92, expressly excluding the French and Danish OCTs and impliedly the Dutch OCTs.[201] A good example of the second category is the 6th VAT

196 In the following I will therefore present his argumentation accordingly, while also adapting the Treaty provisions he cites to the corresponding Treaty provisions after the amendments made by the Lisbon Treaty.

197 The reason why the provisions of Part Three are excluded is that Part Four contains special provisions in this regard which can be seen as a *lex specialis.*

198 Since Ziller was writing before the entry into force of the Lisbon Treaty, his analysis logically focused on the provisions of the TEC, the majority of which he considered applicable to the OCTs. However, Ziller's views should, in particular after the entry into force of the Lisbon Treaty presumably be read as covering also the provisions of the TEU. See the discussion in Kochenov, "The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 23-26; Fletcher, "EU Crime and Policing and the OCTs", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 293-295.

199 Ziller, "The European Union and the Territorial scope of European Territories" (2007) 38 *Vict. U. Wellington L. Rev.*, 56; Ziller, "Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories", in De Búrca and Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?* (Oxford and Portland, Hart Publishing, 2000), 119.

200 Ziller, "Champ d'application du droit communautaire" (Paris, Editions du Juris-Classeur) fasc. 470 *Juris-Classeur Europe, available at* www.lexisnexis.com, nr. 78-85.

201 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [1992] O.J. L302/1, Article 3(1). Now replaced by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code), [2008] O.J. L145/1 (Article 39(5) of which specifies that "In the case of goods benefiting from preferential measures contained in preferential arrangements in favour of the overseas countries and territories associated with the [Union], the rules on preferential origin shall be adopted in accordance with [Article 203 TFEU]).

Directive.[202] In its Article 3, that Directive explicitly excludes some territories from its scope, but the OCTs are not amongst these explicit exclusions. While it is certainly true that the explicit exclusion of OCTs in some acts is, strictly speaking, unnecessary, the fact remains that nothing in the foregoing contradicts the assumption that only the provisions of Part Four of the TFEU apply to the OCTs. It fails to convince, therefore, as an argument to the contrary.

A second argument is derived from the wording of Article 355 TFEU. Ziller points out that Article 355(2) TFEU only states that the OCTs are subject to the provisions of Part Four of the TFEU, without specifying that the other provisions of the Treaties are inapplicable. Moreover, he argues, this provision precedes Article 355(3) TFEU, which extends the territorial scope of the Treaties to European territories for whose external relations a Member State is responsible, and Articles 355(4) and 355(5) TFEU, which lay down certain exceptions to the territorial scope of the Treaties. The fact that Article 355(2) TFEU is placed before these paragraphs and not at the end of Article 355 TFEU or even in a separate Treaty provision, is taken to indicate that not only Part Four of the TFEU, but also the other parts of the Treaties (except Part Three of the TFEU) are applicable to the OCTs.

This argument is rather weak. Article 355 TFEU could perhaps have been drafted in a neater way, but its different paragraphs just seem to regulate different cases, without trying to link them in any way. It is probably wrong, therefore, to infer any conclusion regarding the intent of the masters of the Treaties from the position of Article 355(2) TFEU. Moreover, if the masters of the Treaties were of the opinion that other parts of the Treaties were fully applicable to the OCTs, they would probably have expressly stated this, like they did in Article 355(1) TFEU. For the same reasons Ziller's closely related argument that his view of a wider applicability of Union law to the OCTs finds support in the structure of the Treaties[203] fails to convince.[204] Ziller has pointed out that since the entry into force of the Lisbon Treaty, the territorial scope of Union law is determined for both Treaties in Article 52 TEU and that the exceptions to that territorial scope listed in Article 352 TFEU should be interpreted restrictively. This is again taken to mean that Article 352(2) TFEU must not be interpreted as stating that only the provisions of Part IV of the

---

202 Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, [1977] O.J. L145/1. Now replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] O.J. L112/1, which does not explicitly exclude the OCTs either.

203 Ziller, "Outermost Regions, Overseas Countries and Territories Others after the Entry into Force of the Lisbon Treaty", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 76-78.

204 Ziller made a similar argument in relation to the structure of the rejected EU Constitution (Ziller, "Champ d'application du droit communautaire" (Paris, Editions du Juris-Classeur) fasc. 470 *Juris-Classeur Europe, available at* www.lexisnexis.com, nr. 90). Ziller observed that in the EU Constitution the provisions on the association of the OCTs were found in Title IV of Part Three on the policies and functioning of the Union and deduced from this fact that the other Titles of Part Three, in particular Titles I on Provisions of general application, Title II on non-discrimination and citizenship and Title VI on the Functioning of the Union would have been applicable to the OCTs under the EU Constitution. Still according to the same author, the same would *a fortiori* have been true for the provisions of Part One (fundamental provisions), Two (Charter of Fundamental Rights) and Four (general and final provision), be it under the derogations provided for in respect of the four freedoms in the provisions on the OCTs.

TFEU are applicable to the OCTs. Still, it cannot be denied that Article 352(2) TFEU explicitly provides a derogation to the general regime stated in Article 52 TEU. The precise meaning of Article 352(2) TFEU cannot therefore be determined purely by looking at the structure of the Treaties, but only on more substantive grounds.

A third argument is based on the case law of the Union Courts. Indeed, some cases lend some support to the thesis of wider applicability of the Treaties.[205] Two cases can be cited in this connection. In *Antillean Rice Mills*, the ECJ held that the reference to the "principles set out in the Treaties" in Article 203 TFEU means that when the Council adopts OCT decisions under that article "it must take account not only of the principles in Part Four of the [Treaties] but also of the other principles of [Union] law, including those relating to the common agricultural policy".[206] Accordingly, the ECJ upheld the judgment of the CFI, which had stated that the reference to the principles set out in the Treaties "is not merely to the principles set out in Part Four of the [TFEU] but to all the principles set out in the [Treaties], in particular those listed in Part One, entitled 'Principles'".[207] This case makes very clear that strictly limiting the applicable Treaty provisions to those of Part Four of the TFEU is not tenable. At least, the general principles in Part One of the TFEU must also apply. Nevertheless, the scope of *Antillean Rice Mills* must not be overestimated. Indeed, it must not be overlooked that the Court relied explicitly on the reference to "general principles" in one of the provisions of Part Four. This is still consistent with the view that only the provisions of Part Four of the TFEU *and* the provisions to which they refer are applicable to the OCTs.

Much more important, therefore, is *Kaefer and Procacci*.[208] In that case, the reference for a preliminary ruling was made by the "Tribunal administratif de Papeete", a court in French Polynesia. The UK vividly contested the powers of that court to make such a reference. Its main argument was that Part Four of the TFEU constitutes a *lex specialis* applicable to the OCTs, to the exclusion of the other provisions of the Treaties, including in particular (current) Article 267 TFEU.[209] The ECJ disagreed. To the argument stated it merely replied that Part Four of the TFEU, in particular (current) Article 203 TFEU, empowered the institutions of the Union to lay down provisions relating to the OCTs on the basis of the principles set out in the Treaties. Therefore, according to the ECJ, it had jurisdiction to give a preliminary ruling on the question raised.[210] Besides, the ECJ pointed out, in reply to the UK's second argument, that the tribunal administratif de Papeete was (under French law[211]) a French court, and therefore competent to make references under Article 267 TFEU.[212]

---

205 See also the interesting discussion in Opinion of AG Cruz Villalón in Case C-384/09 *Prunus* [2011] E.C.R. nyr., paras 36-39.

206 ECJ, Case C-390/95 P *Antillean Rice Mills* [1999] E.C.R. I-769, para. 37.

207 CFI, Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills* [1995] E.C.R. II-2305, para. 93.

208 ECJ, Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647. For a more detailed discussion, see the case note by Oliver in (1991) *CML Rev.*, 190-199. See also the discussion in Broberg, "Access to the European Court of Justice by Courts in Overseas Countries and Territories", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 137-152.

209 *Ibid,* para. 7. The case dealt, of course, with the Treaty provisions contained in the TEC. I have replaced them, for the purposes of my discussion, with the corresponding Treaty provisions contained in the TFEU.

210 *Ibid,* paras 9-10.

211 See the more detailed analysis of French law on this point by AG Mischo (Opinion of AG Mischo in Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647, para. 15).

The ECJ's judgment in *Kaefer and Procacci*, again, provides support for the view that other provisions than those embodied in Part Four of the TFEU may be applicable to the OCTs, namely the institutional provisions laid down in Part Six of the TFEU. Yet, it must be pointed out that the ECJ's reasoning on this point is not particularly helpful. It is clear that the Court avoided answering the real question at stake here: whether Part Four of the TFEU constitutes a *lex specialis* or whether other provisions of the TFEU also apply to the OCTs. It found a smart way to base its jurisdiction on the provisions of Part Four, but, as has been noted,[213] this reasoning is not wholly satisfactory. Indeed, Part Four of the TFEU only expressly confers powers on the Commission and the Council, and does not refer to the "institutions of the Union".[214] It requires some imagination to interpret its provisions as conferring any powers on the ECJ. More illuminating is AG Mischo's opinion to the case.[215] The AG's opinion is refreshing in two regards. First, the AG explicitly accepted that some other Treaty provisions than those of Part Four do apply to the OCTs, namely the provisions relating to the institutions. He pointed out that, as Part Four confers powers on both the Council and the Commission, this necessarily implies that the provisions relating to these institutions apply.[216] Otherwise, as the AG points out, the authors of the Treaties would have stipulated that the measures referred to in [Article 203 TFEU] were to be implemented by way of a new Treaty or protocol to be negotiated by the Member States and ratified by the national parliaments.[217] This is a more flexible approach than that of the ECJ, which tried to base its jurisdiction exclusively on the provisions of Part Four of the TFEU. Second, the AG held that the fact that the Tribunal Administratif was a French Court was not sufficient in itself to establish jurisdiction of the ECJ. He argued that [Article 267 TFEU], in the light of its structure and purpose, "can only refer to a court deciding a case arising in a part of the territory of a Member State covered by the provisions of [Union] law".[218] The AG concluded from this that Courts of the OCTs *can* make references under Article 267 TFEU, but only insofar as they concern the specific Treaty provisions which are applicable to them. It followed that the reference in *Kaefer and Procacci* was admissible, because it concerned the interpretation of provisions of the OCT decision, and (current) Articles 199 and 202 TFEU.[219]

AG Mischo's approach is rather pragmatic. He acknowledges that other Treaty provisions besides those of Part Four of the TFEU apply to the OCTs, but confines their application

---

According to Arnull, courts and tribunals situated in these territories may invoke Article 267 TFEU even if they cannot be considered part of the domestic court system of a Member State, because of the need to ensure the proper application of the arrangements for association set out in Part Four of the TFEU (Arnull, "The evolution of the court's jurisdiction under Article 177 EEC" (1993) *E.L. Rev.*, 129, at 133).

212 ECJ, Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647, para. 8. Article 267 TFEU embodies the possibility to refer preliminary questions for "any court or tribunal of a Member State".

213 Ziller, "Champ d'application du droit communautaire" (Paris, Editions du Juris-Classeur) fasc. 470 *Juris-Classeur Europe, available at* www.lexisnexis.com, nr. 82.

214 This denominator would cover the European Parliament, the European Council, the Council, the Commission, the Court of Justice, the European Central Bank and the Court of Auditors (Article 13 TEU).

215 Opinion of AG Mischo in Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647.

216 *Ibid.*, para. 11.

217 *Ibid.*, para. 12.

218 *Ibid.*, para. 16

219 *Ibid.*, paras 17-18.

to what is necessary to make the provisions of Part Four work. The AG is probably correct in holding that if certain provisions of the Treaties are to apply to the OCTs it must also be possible for courts of the OCTs to make references for preliminary rulings with regard to these provisions, given the paramount importance of the preliminary rulings procedure in the [Union] legal order.[220] This pragmatic approach can be endorsed. Neither a strict insistence on limiting the applicable Treaty provisions to those contained in Part Four of the TFEU, nor an overly broad conception of the scope of the Treaty provisions are realistic. Agreeing with Kochenov, Part Four of the TFEU can only become truly functional as part of the EU legal system if other vital elements of this system equally guide the legal position of the OCTs associated with the Union.[221]

This pragmatic approach regarding the applicability of the Treaties can be applied, by analogy, to other Treaty provisions than the institutional provisions, in particular the Treaty provisions on Union citizenship. Indeed, just as the applicability of the institutional provisions may be necessary in order to make the association with the OCTs work, it may be argued that the applicability of the provisions on Union citizenship is necessary for this reason. As was explained above, OCT nationals are Union citizens. This in itself does not, of course, entail the applicability of the provisions on citizenship *ratione loci* in the OCTs. Yet, on the basis of the pragmatic approach to the applicability of the Treaties just outlined, it is arguable that at least some of the provisions conferring rights on Union citizens may apply *ratione loci* in the OCTs. As has been explained above, a close association exists between the Union and the OCTs. This association should not be seen in purely economic terms. It also has the purpose *inter alia* of promoting the economic and social development of the OCTs and of furthering the interests and prosperity of the inhabitants of the OCTs "in order to lead them to the economic, social and cultural development to which they aspire".[222] In its 2009 Communication the Commission further states that the solidarity between the EU and OCTs should be based on the fact that all inhabitants of the OCTs are in principle Union citizens.[223] Arguably, the purposes stated could only be achieved if OCT nationals could make use of the rights they enjoy as Union citizens, also in the OCTs. This would, in turn, entail the applicability of other provisions such as institutional provisions[224] or general principles, such as the principle of equal treatment. As such, the provisions on Union citizenship could become a catalyst for wider application of Union law in the OCTs. At the very least, the purposes stated should entail an obligation for OCT authorities not to hinder the possibility to exercise these rights in the Member States.[225]

---

220 See, *e.g.*, ECJ, Case 26/62 *van Gend & Loos* [1963] E.C.R. 1.

221 Kochenov, "The impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community" (2009) 36 *LIEI*, 248. See also the very insightful discussion in Opinion of AG Cruz Villalón in Case C-384/09 *Prunus* [2011] E.C.R. nyr., paras 23-35 (who points out *inter alia* that a strict insistence on the view that only the provisions of Part Four of the TFEU apply to the OCTs would entail practical difficulties such as third countries possibly benefitting from more advantageous arrangements than OCTs).

222 See Article 198 TFEU and the preamble to the OCT decision.

223 N. 188, *supra*, at 3.

224 For instance the provisions on the European Parliament have to be applicable by implication if OCT nationals can participate in European Parliamentary elections. See the discussion, *infra*, of the *Eman and Sevinger* case.

225 One example of such hindrance could occur where an OCT would impose very burdensome conditions on its nationals that want to leave the OCT in order to travel to one of the EU Member State, in exercise of their right to free movement. See the discussion *infra.*

Below I will examine in more detail the perspectives offered by the pragmatic approach just outlined and its tenability specifically in relation to the free movement rights and electoral rights enjoyed by Union citizens. Before doing so, it is necessary to point from the outset at an obvious and significant counterargument to the pragmatic approach described, namely that it is in conflict with the case law of the ECJ. As explained above, in *Eman and Sevinger*[226] the ECJ explicitly confirmed the *Leplat* case law holding that "failing express reference, the general provisions of the [Treaties] do not apply to the OCTs".[227] This would seem to exclude the possibility of applying the Union citizenship provisions in the OCTs. However, as was demonstrated in the foregoing, a strict reading of the *Leplat* case law can in any event no longer be sustained. Moreover, in *Eman and Sevinger*, the ECJ itself acknowledged the applicability of other provisions of Union law, namely the general principle of equal treatment. The better view therefore is perhaps to consider the *Leplat* case law, despite the reference in *Eman and Sevinger*, as having become obsolete.[228] In future case law the ECJ will hopefully no longer refer to it.

ii) Union citizenship provisions

A second set of arguments made in favour of wider applicability of the Treaties is based, not so much on the need to make the association with the OCTs work, but rather on the need to preserve the *effet utile* of the provisions on Union citizenship. Ziller has argued that the non-applicability of the provisions on Union citizenship to the OCTs could infringe the principle of non-discrimination.[229] He observes the distinction pointed out higher between the personal scope of Union citizenship ("all OCT nationals are Union citizens)" and the territorial scope of the provisions on Union citizenship (they do not apply, under the traditional approach, to the OCTs). In this connection, he points out that one could focus on the territorial scope of the citizenship provisions, such as the right to free movement, and conclude that they are not applicable to the OCTs. At the same time, he argues, all Union citizens should have the same citizenship rights and the territorial origin of citizens of a Member State on the territory of the State should have no consequences in this regard. This leads him to point at an apparent contradiction between the territorial scope and the personal scope of the free movement rights. He adds that

---

226 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 46. Before *Eman and Sevinger*, Ziller had argued that no undue weight should be given to the *Leplat* case law because of the ECJ, not having had to solve an issue about citizenship or general principles, had had no opportunity to better formulate its position. In the meantime, Ziller has acknowledged that his interpretation of *Leplat* has been rejected by the ECJ (Faberon and Ziller *Droit des collectivités d'outre-mer* (Paris, LGDJ, 2007), 261). Still, the ECJ's confirmation of *Leplat* in *Eman and Sevinger* should not be given undue weight. As Ziller and other have argued, it should probably be considered to have become obsolete (see n. 228, *infra*).

227 ECJ, Case C-260/90 *Leplat* [1992] E.C.R. I-643, and confirmed in later cases.

228 Ziller, "Outermost Regions, Overseas Countries and Territories Others after the Entry into Force of the Lisbon Treaty", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 77-78; Kochenov, "The impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community" (2009) 36 *LIEI*, 255.

229 Ziller, "The European Union and the Territorial scope of European Territories" (2007) 38 *Vict. U. Wellington L. Rev.*, 56; Ziller, "Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories", in De Búrca and Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?* (Oxford and Portland, Hart Publishing, 2000), 119. Ziller makes this argument specifically with the right to free movement. I will explain his reasoning applied to the provisions on Union citizenship, more broadly.

giving priority to the territorial scope would infringe upon the most basic principles of Member States' constitutional law, namely the exclusion of discrimination between citizens according to their origin.

That argument essentially suggests that, if more burdensome conditions apply to the free movement of persons between OCTS and Member States – for travels from one of the OCTs to one of the Member States – than between two Member States, this is to the disadvantage of OCT nationals and, therefore, discriminatory. That cannot be accepted without more. There is, legally speaking, no room for giving priority to either personal or territorial scope of the Union citizenship provisions. Both scopes should always be taken into account. The fact that Union citizens cannot exercise their rights in the OCTs, can *prima facie* not in itself constitute a violation of the principle of equal treatment as long as this is true for all Union citizens regardless of their origins. Put differently, the non-discrimination principle requires that the citizenship provisions equally apply to OCT nationals, but does not require as such that they also apply to the OCTs, geographically speaking. Besides, it must be remarked that, in purely internal situations, Union law does not object to OCT nationals being treated less favourably than nationals from the mainland.

Still, there is some value in the argument that fully excluding the OCTs from the scope of application *ratione loci* will *de facto* hurt OCT nationals more than other Union citizens, since they will mostly reside in the OCTs and not be able to exercise their citizenship rights there. Consequently, OCT nationals would seem to be, *prima facie* again and despite formally having the status of Union citizenship, in a less beneficial position than other Union citizens, as far as the possibility to exercise their citizenship rights is concerned. On the basis of these inferences it could be concluded that OCT nationals would, despite the conclusions reached under part II, more accurately have to be considered second-class citizens, enjoying an inferior status than other Union citizens. This would be an argument for a more inclusionary approach towards OCT nationals by extending the benefit of the citizenship provisions to the OCTs. This is, of course, not a legal argument, since legally speaking the non-applicability *ratione loci* of the citizenship provisions to the OCTs does not constitute discrimination, as I have explained. Still it is an important policy argument that could guide the Commission in its development of a new model for association, which will, as appears from the recent Commission documents, be characterised by a wider applicability of Union law in the OCTs.

c) Outline of the analysis

In the following I will examine to what extent the particular legal status of the OCTs has an impact on the exercise of citizenship rights by OCT nationals. As stated above, I will concentrate on two types of citizenship rights, namely free movement rights, on the one hand, and electoral rights, on the other hand. For both of them I will consider the possibilities and consequences under the two approaches outlined above. Besides, I will examine to what extent the Union citizenship provisions may have acted as factor that prompted the Member States to change their policies and legislation with regard to their citizens resident in or having a particular connection with one of their OCTs.

B. Free Movement Rights

Below I will analyse to what extent OCT nationals enjoy the right to free movement. I will make a distinction between, on the one hand, economic free movement rights, *i.e.* the right to free movement for economic actors (workers, providers of services and self-employed persons) and, on the other hand, the general right to free movement laid down in Article 21 TFEU, *i.e.* the right to free movement as Union citizens, regardless of economic activity. The reason for making this distinction is the fact that Part Four of the TFEU, which indubitably applies to the OCTs, lays down provisions with regard to the first category of free movement rights, but not with regard to the second one.

1. Economic free movement rights

The most important provision in Part Four of the TFEU relating to the free movement rights of OCT nationals is without any doubt Article 202 TFEU [*ex Article 186 TEC*], which states:

> "Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be regulated by acts adopted in accordance with Article 203[230]".

This provision has been much discussed in legal literature. Some authors have interpreted it as meaning that OCT nationals will only enjoy free movement rights within the Union once an act is adopted in accordance with Article 203 TFEU, laying down the specific rules and conditions for the exercise of these rights. As has been rightly observed, no Council act has ever been adopted for that purpose.[231] Therefore, so the argument continues, OCT nationals do *not* at present have free movement rights within the Union.[232]

I have already pointed out that this opinion is obviously wrong, since OCT nationals are Union citizens and enjoy, for that reason, the right laid down in Article 21 TFEU, as was confirmed by the Court in *Eman and Sevinger* (see the discussion, *infra*). Moreover, it is wrong, even when Union citizenship is not taken into consideration. The authors just referred to seem to overlook the fact that Article 202 TFEU deals with free movement of workers only. The absence of specific Council acts in this connection means at most that Union law cannot be relied on in order to claim the right to enter and reside in the Union "in order to obtain and pursue salaried employment there".[233] By contrast, OCT nationals

---

230 Article 203 TFEU provides that the Council is to act unanimously on a proposal from the Commission and, where it acts in accordance with a special legislative procedure, after consulting the European Parliament. Old Article 186 TEC was slightly different in wording in that it provided for the free movement of workers to be governed by *agreements to be concluded subsequently with the unanimous approval of Member States*, rather than governed by Union acts adopted by the Council.

231 And, one should add, before the entry into force of the Lisbon Treaty no agreement to that purpose has ever been concluded.

232 See the references in n. 166, *supra*, and the accompanying text. The same conclusion is reached by Evans, "Nationality Law and European Integration" (1991) 16 *E.L. Rev.*, 190.

233 ECJ, Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647, para. 13 (dealing with the converse situation of nationals of Member States claiming the right to enter and reside in an overseas country or territory in order to obtain and pursue salaried employment there). See, also making this point, Custos, "Implications of the European Integration for the Overseas", in

do enjoy the right of establishment and the right to provide services in the Member States, although subject to certain special provisions laid down pursuant to Article 203 TFEU.[234] These rights necessarily encompass a right of entry and residence in the Member States, as was confirmed by the ECJ.[235] It should be clear from this that OCT nationals in any event enjoy economic free movement rights, even at present, namely for the purposes of establishment and provision of services.

As far as the free movement of workers is concerned, Article 203 TFEU *prima facie* seems to have for a consequence that OCT nationals can only enjoy this right once it is regulated by a Council act. This is confirmed in the Commission's 2008 Green Paper, which states[236]:

> "As European citizens, OCT nationals are in principle also entitled to the rights conferred by Union citizenship (as laid down in [Articles 21 to 25 TFEU]), such as the right to move and reside (*but not work*) freely within the territory of the Member States."

In this regard the Commission remarks that no arrangements have been agreed so far on the right to free movement of workers between the OCTs and the Member States because the procedure for agreeing such arrangements was, until the entry into force of the Lisbon Treaty, very cumbersome. Indeed, old Article 186 EC required such arrangements to be determined by agreements with the unanimous approval of the Member States. At the same time, the Commission notes that the new procedure of Article 203 TFEU will facilitate regulation of the issue.[237] It is very likely, therefore, that the next OCT Decision, the first one to be adopted under Article 203 TFEU, will include provisions on the free movement of workers alongside provisions on the other freedoms. If this happens, OCT nationals will in any event enjoy the benefit of the provisions on the free movement of workers, under the arrangements laid down in the OCT decision.

However, it can seriously be questioned whether, in the absence of any Council acts adopted under Article 203 TFEU, OCT nationals do not have the right to take up salaried work. Given my conclusion that OCT nationals cannot be distinguished from other Union citizens in terms of the rights they enjoy, it would seem that they can, in accordance with

---

Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 109.

234 See Article 199(5) TFEU and Articles 44-46 of Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community, [2001] O.J. L314/5. Similar, though less elaborated provisions were included in earlier OCT Decisions. See Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community, [1991] O.J. L263/1, Articles 232-233; Council Decision 86/283/EEC of 30 June 1986 on the association of the overseas countries and territories with the European Economic Community, [1986] O.J. L175/1, Articles 176-177 (these provisions were discussed in ECJ, Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647). For a more detailed discussion, see Goldner Lang and Perišin, "Free Movement of Services and Establishment in the Overseas", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 179-198.

235 ECJ, Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647, para. 14 (again it must be remarked that this concerns the converse situation of a Member State national moving to one of the OCTs; in this respect both situations are arguably analogous).

236 Commission Green Paper on Future relations between the EU and the Overseas Countries and Territories, COM(2008) 383 final, at 6 (emphasis added).

237 See the Commission Staff Working Document (SEC(2008) 2067) accompanying the Commission Green Paper on Future relations between the EU and the Overseas Countries and Territories, COM(2008) 383 final, at p. 31.

Directive 2004/38, travel from one Member State to another Member State in order to carry out employed work there.[238] The nationality laws of the four Member States discussed simply do not put any sort of "overseas" label on OCT nationals which would allow Member States to treat them differently from other Union citizens as far as the application of Directive 2004/38 is concerned. This is implicitly confirmed by the current OCT Decision, which, for the purposes of regulating the right to establishment and the right to provide services, employs the concept "inhabitants of an OCT", which it defines as "persons ordinarily resident in an OCT who are nationals of a Member State or who enjoy a legal status specific to an OCT" (see Article 45(1)(b)). Article 45(1)(b) immediately adds, however, that that definition is without prejudice to the rights conferred by Union citizenship. This confirms that the OCT Decision does not affect any rights OCT nationals may enjoy in their capacity of Union citizens.[239] The better view is, therefore, probably that OCT nationals may rely on their status of Union citizen in order to enjoy the benefit of the provisions regarding the free movement of workers in the Member States, even in the absence of any OCT Decision regulating this right. Accordingly, the Commission's view quoted above should be rejected as being mistakenly based on a purely "territorial" reading of Article 202 and 203 TFEU, which does not square with the fact that OCT nationals are Union citizens. For that reason, it has become outdated.[240]

This is not to say that Article 203 TFEU is meaningless and that any Council act concluded on that basis for regulating the rights laid down in Article 202 TFEU would be without legal consequences. In the first place, such a Council act is probably required in order to give non-OCT Union citizens the benefit of the provisions of the free movement of workers in the OCTs.[241] Indeed, since the provisions on the free movement of workers and Directive 2004/38 do not apply *ratione loci* in the OCTs,[242] they cannot be relied on by Union citizens wishing to establish themselves in one of the OCTs for the purposes of carrying out salaried work.[243] Consequently, OCTs are not precluded by the provisions on Union citizenship from reserving the right to free movement of workers to their own nationals. To this effect they may employ criteria such as residence in order to distinguish

---

238 See Article 7(1)(a) of Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. L158/77.

239 This point is also made by Omarjee, "Les statuts constitutionnels des ressortissants des outre-mers", in Tesoka and Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité* (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 59-60.

240 This conclusion is also reached by Kochenov (Kochenov, "Regional Citizenships and EU Law: the Case of the Aland Islands and New Caledonia" (2010) 35 *E.L. Rev.*, 319). The outdated "territorial" approach is found in Article 42(3) of Council Regulation 1612/68, which states that workers from the OCTs may not invoke the benefit of the provisions of this Regulation in the territory of the other Member States. This provision has, for the reasons explained, clearly become outdated.

241 In this respect, ECJ, Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647, para. 13 is still good law. It cannot, however, be seen as authority on the scope of the free movement provisions in the converse situation, namely movement from the OCTs to the Member States rather than from the Member States to the OCTs.

242 Such is traditionally assumed, at least. See on this point my detailed analysis under III.B.2., *infra*.

243 Faberon and Ziller *Droit des collectivités d'outre-mer* (Paris, LGDJ, 2007), 255. See also ECJ, Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647, para. 19 ("the arrangements governing matters of establishment and provision of services in the overseas countries and territories […] do not, however, extend to the entry into and residence in those countries and territories of other nationals of Member States who do not carry on or seek to carry on an activity as a self-employed person").

their own nationals from other Member State nationals.[244] In the second place, such a Council act would allow "OCT inhabitants" who do not have the nationality of a Member State (see the definition in Article 45 of the OCT Decision) and hence are not Union citizens to invoke the provisions on the free movement of workers.

The foregoing essentially concerns the free movement rights of OCT nationals for economic purposes within the territory of the Member States. A question which has not been answered so far is whether the free movement provisions apply to travels between the territories of the OCTs and the Member States. Put differently, it still needs to be determined whether the free movement provisions may be relied upon by OCT nationals in order to gain a right of entry in the territory of the Member States for the purposes of carrying out an economic activity there. This question will be dealt with under the following heading, in relation to the general right to free movement laid down in Article 21 TFEU. I refer to that discussion, since, arguably, the same reasoning can on this point be adopted with regard to free movement for both economically active and non-economically active OCT nationals

2. General right to free movement

The general right to free movement laid down in Article 21 TFEU is enjoyed by all Union citizens. There can be no doubt, therefore, that it is also enjoyed by OCT nationals, who are, for our purposes, Union citizens. Consequently, OCT nationals enjoy not only free movement rights as economic actors, but also a general right to free movement in their capacity as Union citizens. The only difficult issue concerning this right is the determination of its territorial scope. Article 21(1) TFEU provides:

> "Every citizen of the Union shall have the right to move and reside freely *within the territory of the Member States*, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." (emphasis added)

It is clear that Article 21(1) TFEU only applies "within the territory of the Member States".[245] This raises the interesting question whether the OCTs are covered by this wording. If not, the free movement of Union citizens from the OCTs to the Member States is not regulated by Article 21 TFEU and that could entail the possibility of subjecting this right to more burdensome conditions than would be allowed in relation to free movement between Member States.

---

244 This is not in contradiction with my observation higher that criteria to distinguish OCT nationals from other Member State nationals are not valid in the light of the provisions on Union citizenship. That observation was made in relation to the personal scope of Union citizenship. Here I am concerned with the territorial scope of the (economic) free movement provisions. Since these provisions do not apply *ratione loci* in the OCTs, they can not be relied on in those territories by Union citizens in their capacity as Union citizen. Hence, it is possible for OCTs to employ certain criteria such as residence to deny these rights to certain groups of Union citizens.

245 The same is clear from the title of the Residence Directive, adopted on the basis of, *inter alia*, Article 18 TEC (now Article 21 TFEU): Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. L158/77.

Before analysing the legal regime surrounding the free movement between OCTs and the Member States, it is necessary to make one important point. Since OCT nationals are Union citizens, they do enjoy within the Member States exactly the same free movement rights as all other Union citizens. Indeed, free movement between two Member States is indubitably covered by the expression "within the territory of the Member States" contained in Article 21 TFEU. Consequently, once an OCT national is legally resident in one Member State, he can travel to another Member State under the same conditions as any other Union citizen. As explained higher, this logically follows from the fact that the nationality laws of the four Member States discussed higher do not make any distinction between nationals from mainland Europe or from overseas. OCT nationals do not hold different passports than other nationals of their Member State. Consequently, there is simply no legal basis for treating OCT nationals any different as far as the exercise of free movement rights in the Member States is concerned.

Within the territories of the Member States, Article 21 TFEU in fact confers two rights. On the one hand, it confers a right to travel from the territory of one Member State to the territory of another one.[246] This encompasses three situations. First of all, a Union citizen may move from a Member State of which he is a national[247] to a Member State of which he is not a national. Secondly, a Union citizen may move between two Member States of which he is not a national. These situations fall without doubt under Article 21 TFEU. Indeed, Article 3 of Directive 2004/38 provides: "This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national…". Thirdly, a Union citizen may move from one Member State (of which he may or may not be a national) to a Member State of which he is a national. This situation would not seem to fit in with the wording of Article 3, but it is clear from case law that this situation too should be considered to fall under Article 21 TFEU.[248] On the other hand, Article 21 TFEU confers a right of residence within the territory of the Member States. It applies where a Union citizen resides in a Member State of which he does not have the nationality. Article 21 TFEU may even apply where a Union citizen resides in his own Member State, provided that he or she has exercised his or her right to free movement.[249] In some limited circumstances it would seem to be even applicable to Union citizens who have always resided in a Member State of which they are a national, provided that they are confronted with a national measure which has the effect of depriving them of the genuine enjoyment of the substance of their citizenship rights or of impeding the exercise of their right of free movement and residence.[250] The bottom-line is that Article 21 TFEU encompasses, under certain conditions, both the right to move from one Member State to

246 There are a vast number of cases confirming this. Just to mention a few: ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, ECJ, Case C-456/02 *Trojani* [2004] E.C.R. I-7573.

247 In the case of OCT nationals this is the associated Member State.

248 ECJ, Case C-378/97 *Wijsenbeek* [1999] E.C.R. I-6207, para. 22. The Court pointed out specifically that such a situation cannot be considered as purely internal, because the citizen concerned will have exercised his right to free movement within the Union before entering his State of origin, *Ibid*. para. 19. For a discussion: see Staples, "Een gemiste kans voor het Hof van Justitie?" (2000) *N.T.E.R.*, 1-6. See also the discussion in Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] E.C.R. nyr, paras 24-29.

249 See, to illustrate this point, ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683; ECJ, Case C-353/06 *Grunkin and Paul* [2008] E.C.R. I-7639.

250 See ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr. and ECJ, Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613 (as interpreted by the ECJ in the former case). See also the detailed discussion in Chapter 4*, infra*.

another Member State and the right to reside in a Member State, provided one has a sufficient link with the Union legal order.[251] Given the personal scope of Article 21 TFEU, these rights are enjoyed by all Union citizens, including OCT nationals. For example, a Dutch National born and raised in Aruba, but legally resident in Amsterdam, may claim the right to move to France under the conditions of Directive 2004/38. Or, suppose the same person lives in Paris, and has never been in the Netherlands, he or she may still invoke Article 21 TFEU in combination with Article 18 TFEU when for example he is being discriminated against in comparison with French citizens.

The aforementioned examples only occur once an OCT national is present in the territory of a Member State. The more difficult question is whether Article 21 TFEU and the expression "within the territory of the Member States" also cover the right to move from the territory of an OCT to the territory of the Member States. This issue has never been clearly outlined in secondary Union legislation or in the case law of the ECJ. Two views are possible, in line with the two general approaches to the applicability of the Treaties to the OCTs outlined above. Under the traditional approach, Article 21 TFEU does not apply in the OCTs, since only the provisions of Part Four of the TFEU and the provisions of the Treaties to which the latter refer are applicable to OCTs. Accordingly, the phrase "within the territory of the Member States" should, according to this first view, not be held to include the territory of the OCTs. Consequently, since the OCTs fall outside the scope of Article 21 TFEU, it cannot be relied upon by Union citizens in the OCTs, for instance in order to challenge restrictions to the exercise of this right. However, it is also possible to argue, drawing on arguments developed under what I called higher a "dynamic approach", that Article 21 TFEU does apply to movement between OCTs and Member States. In my view, this is the approach that should be followed. I will develop this line of the reasoning in the following point (a). Next I will consider the legal consequences of this approach for the free movement rights of OCT nationals (b).

a) Article 21 TFEU applies to movement between OCTs and the Member States

This view holds that Article 21 TFEU, while perhaps not being fully applicable to the OCTs, should at least entail the right for OCT nationals to travel from the OCTs to the Member States. Put differently, it should be possible for them to rely on Article 21 TFEU in order to challenge restrictions imposed by the OCTs on travels to one of the Member States. Only restrictions on travels to the associated Member State in purely internal situations should be considered to fall outside the scope of Article 21 TFEU (see the discussion, *infra*).

The reasons for holding this first view are convincing. Higher I explained that all OCT nationals are Union citizens and do enjoy the rights associated with this status. One of these rights is the right to move freely within the territories of the Member States. It is clear that this right can only fruitfully be exercised if OCT nationals are entitled to freely leave their OCTs in order to enter the territory of the Member States. If Article 21 TFEU could not be relied on by OCT nationals in order to challenge restrictions to this right (in situations presenting a link with Union law), this would, arguably, take away the *effet utile*

[251] This link will normally consist in the fact that a Union citizen has exercised his right to free movement, but – as was pointed out – in exceptional circumstances the status of Union citizen with the associated rights may also provide a sufficient link. See the detailed discussion in Chapter 4, *infra*.

of their free movement rights. This view can draw some inspiration from the ECJ's reasoning on the substance in *Kaefer and Procacci*.[252] The case concerned two (non French) Union citizens who wished to settle in French Polynesia, a French OCT, but were refused this right by the High Commissioner of the French Republic in Polynesia. The applicants claimed that this refusal was contrary to Article 176 of the (then applicable) OCT-decision, which granted nationals of the Member States the right of establishment and the right to provide services in the OCTs. The ECJ noted in this regard that "[i]t is obvious that the exercise of the right of establishment and provision of services in the overseas countries and territories must require a right of entry and residence".[253] On a similar line of reasoning, one could argue that the exercise of the right to move and reside freely within the Member States contained in Article 21 TFEU must require a right of entry and residence in those territories.[254]

Besides, this view is also supported by the need to preserve and further enhance the *effet utile* of the association with the OCTs. As explained above, the provisions of Part Four of the TFEU do not operate in a legal vacuum. Other Treaty provisions than those contained in Part Four of the TFEU must necessarily apply to the OCTs to some extent in order to make the association with the Member States work. I submit that this is the case for Article 21 TFEU, at least to the extent that it entails a right of entry into the Member States. As explained higher, the purposes of the association can, arguably, only be achieved if OCT nationals can fully make use of the rights they enjoy as Union citizens. Such would not be the case if the Article 21 TFEU did not entail a right to move from the OCTs to the territories of the Member States. It is obvious that the right to move and reside freely in the territories of the Member States only has a substance to it if it entails an initial right to enter those territories. Accordingly, I do not agree with the view put forward by Tryfonidou, who states that OCT nationals who wish to move from an OCT to a Member State cannot merely rely on Article 21 TFEU but "should rather rely on Article 20(2) TFEU in conjunction with the relevant market freedom".[255] Accordingly, in the view of that author, OCT nationals only have the right to move to the territory of the Member States for the purpose of exercising an economic activity.[256] In my opinion this view does not give sufficient weight to Union citizenship, which is the fundamental status of Member State nationals regardless of economic activity, and mistakenly views the purpose of the association with the OCTs in purely economic terms.

---

252 See also n. 208 and the accompanying text, *supra*.

253 ECJ, Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] E.C.R. I-4647, para. 15.

254 This view can draw some support from the judgments in *Ruiz Zambrano* and *McCarthy*. In those judgments the ECJ held that a national measure which had the effect of obliging a Union citizen to leave the territory of the Union would violate the provisions on Union citizenship, because this would deprive him of the genuine enjoyment of the substance of his citizenship rights (see the detailed discussion in Chapter 4, *infra*). On a similar line of reasoning one could argue that a national measure precluding a Union citizen from entering the territory of the Union would deprive the latter of the genuine enjoyment of his citizenship rights, and, more in particular, create an obstacle to his right to free movement.

255 Tryfonidou, "The Free Movement of Goods, the Overseas Countries and Territories and the EU's Outermost Regions: Some Problematic Aspects" (2010) 37 *LIEI*, 334.

256 Tryfonidou, "The Free Movement of Goods, the Overseas Countries and Territories and the EU's Outermost Regions: Some Problematic Aspects" (2010) 37 *LIEI*334-337 (admittedly, the author is in this contribution mainly concerned with economic free movement and the possibility for OCT nationals to rely on the free movement of goods in particular.

b) Legal consequences

Accepting the view that Article 21 TFEU applies to travels by Union citizens from the OCTs to the Member States has for a consequence that exactly the same rules apply as to free movement between Member States. The particular situation of the OCTs has, however, two consequences. First, since OCTs are not part of the European territory, entry into the Member States will be subjected to the Schengen rules on border controls for crossing external borders, even if the associated Member State is part of the Schengen zone. Second, since OCTs are not separate Member States but rather part of a Member State, domestic arrangements for travelling between the OCTs and the associated Member State may escape review under the Union rules applicable to free movement. The applicable rules imposed by Union law and the possible rules that can be imposed by the associated Member States are discussed in the following.

Another obvious consequence of holding Article 21 TFEU only applicable to travels from the OCTs to the Member States is that it cannot be relied on by Union citizens who want to travel from one of the Member States to an OCT or who want to travel between the different OCTs. In this connection it is possible to speak of a "one-way freedom of movement".[257] Similar to what was pointed out higher in relation to economic free movement of persons, the non-applicability of Article 21 TFEU to travels from the Member States to the OCTs allows the OCT authorities to impose additional conditions on the entry and free movement of non-OCT citizens of the Union. In this connection they may validly employ criteria to distinguish between OCT nationals and non-OCT nationals. A good example is the new Law on the entry and expulsion of foreigners applicable in the BES Islands, which in its Article 1a distinguishes between "BES nationals" and "non-BES nationals".[258] Such criteria are not contrary to Article 18 TFEU, which is not, in the absence of another link with Union law, applicable *ratione loci.*

i) Union law provisions

Persons travelling from one of the OCTs to one of the Member States are subject to the rules laid down in the so-called Schengen *acquis*,[259] which has been incorporated into Union law pursuant to a protocol annexed to the Treaties by the Treaty of Amsterdam.[260] As a consequence of the Schengen Agreement, in principle no formalities are to be

257 Kochenov, "Substantive and Procedural issues in the Application of European Law in the Overseas Possessions of European Union Member States" (2008-2009) 17 *Mich. St. J. Int'l L.*, 251.

258 Wet toelating en uitzetting BES of 30 September 2010, Stb. 2010, 364.

259 For detailed discussions, see Karanja, *Transparency and proportionality in the Schengen information system and border control co-operation* (Nijmegen, Brill, 2008), 466 pp.; Wichmann, "The Participation of the Schengen Associates: Inside or Outside?" (2006) 11 *E.For.Aff.Rev.*, 87-107; Den Boer, "Schengen III: The show must go on" (2006) *SEW*, 316-322; Kuijper, "Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis" (2000) 37 *CML Rev.*, 345-366; Schutte, "Schengen: its Meaning for the Free Movement of persons in Europe" (1991) *CML Rev.,* 549-570.

260 Protocol (No 2) integrating the Schengen Acquis into the framework of the European Union, annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam, [2006] O.J. C321E/191, now replaced by Protocol (No 19) on the Schengen *Aquis* integrated into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, [2010] O.J. C83/290.

fulfilled when a person travels from one Member State to another Member State,[261] with the obvious exception of travels to those Member States to which the Schengen *acquis* does not apply.[262] This absence of internal borders is to be further enhanced by Union measures taken pursuant to Article 77 TFEU "with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders".[263] The OCTs, however, are not genuine EU territory, and the border between OCTs and Member States cannot, therefore, be considered internal borders. This is confirmed by Article 138 of the Schengen Convention,[264] which provides that the Convention shall apply only to the European territory of the French Republic, and, as regards the Kingdom of the Netherlands, only to the territory of the Kingdom in Europe.[265] France has also stated, in an official declaration, that this scope of application would not be changed by the incorporation of the Schengen *acquis* into the framework of the European Union.[266] Similarly, on the occasion of the accession of Denmark to the Schengen Convention it was explicitly stated that the Convention would not apply to Greenland.[267] This exclusion of

---

261 Schengen Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, [2000] O.J. L239/19, Article 2. For the possibility of introducing temporary border checks, see Groenendijk, "Reinstatement of Controls at the Internal Borders of Europe; Why and Against Whom?" (2004) *E.L.J.* 150-170.

262 This is and will remain the case in the foreseeable future for travels to the United Kingdom and Ireland. These two Member States retain the right to carry on checks on any person crossing their borders from another Member State. See Protocol (No 20), annexed to the TEU and TFEU, on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and Ireland, [2010] O.J. C83/293 (replacing the Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam). They may, however, at their request take part in certain measures. See Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, [2010] O.J. C83/295, Article 3. See also Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, [2000] O.J. L131/43. For further details, see Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), Chapter 10.

263 *E.g.* Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] O.J. L105/1.

264 Schengen Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, [2000] O.J. L239/19. See also the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders Schengen, [2000] O.J. L239/13. See further the literature referred to in n. 259, *supra*.

265 See, similarly, the Agreement on cooperation in proceedings for road traffic offences and the enforcement of financial penalties imposed in respect thereof, [2000] O.J. L239/429, Article 18. This Agreement was adopted by Decision of the Executive Committee of 28 April 1999 on the Agreement on Cooperation in Proceedings for Road Traffic Offences (SCH/Com-ex (99) 11, rev. 2), [2000] O.J. L239/428.

266 Declaration by France concerning the situation of the overseas departments in the light of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty of Amsterdam. On the legal value of this declaration, see Ziller, "The European Union and the Territorial scope of European Territories" (2007) 38 *Vict. U. Wellington L. Rev.*, 54.

267 Agreement on the Accession of the Kingdom of Denmark to the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders signed at Schengen on 19 June 1990, [2000] O.J. L239/97, Article 5(1).

the OCTs from the scope of application of the Schengen Convention[268] means that the rules concerning the crossing of external borders apply when travelling from OCTs to one of the (Schengen) Member States. OCT nationals will need travel documents and will be subject to checks, when travelling from an OCT to an EU Member State.[269]

It follows that, as regards border controls, travels between OCTs and the Member States are subject to a different regime than travels between Member States which are part of the Schengen area. This should not be taken to mean that OCT nationals enjoy more limited free movement rights than other Union citizens. First of all, it must be pointed out that the exclusion from the Schengen Convention applies to all non-European territories of the French Republic. This includes also the so-called overseas departments and regions, which are – with the exception of Mayotte – not OCTs, but outermost regions, to which the Treaties (almost) fully apply (Articles 349 and 355(1) TFEU). The inhabitants of overseas departments and regions would also need travel documents when travelling to one of the Member States, even though they are not normally OCT nationals. More importantly, one should not fail to distinguish between the personal and territorial scope of the Schengen Convention. The Schengen Convention has essentially a territorial scope of application. Checks will in principle only be carried out when entering the Schengen zone, but no longer once a person is inside the Schengen zone. This is true irrespective of the nationality of this person. An OCT national will need a valid passport when flying from Aruba to Amsterdam, but normally not when travelling from Amsterdam to Paris. Exactly the same is true for, say, a Belgian national making the same trip.

Substantively, travels by OCT nationals from one of the OCTs to the Member States are subject to exactly the same conditions as travels between the Member States, most importantly the ones laid down in Directive 2004/38,[270] although Member States may always be less restrictive than what is allowed for by the Directive (see Article 37 of the Directive).[271] Consequently, OCT nationals do not need a visa to enter the EU, unlike citizens from many other countries.[272] Showing a passport or an identity card will suffice to enter the territory of another Member State, just like for all other Union citizens.[273] Similarly, OCT nationals may only be refused entry into the territory of another Member State on certain grounds of public policy, public security and public health.[274] These

---

268 This only happened of course with regard to the OCTs belonging to Denmark, the French Republic and the Kingdom of the Netherlands. No similar exclusion exists for the British OCTs, as the United Kingdom is not a party to the Schengen Convention.

269 Schengen Convention, Articles. 3-6; Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] O.J. L105/1, Article 6.

270 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. L158/77.

271 See also ECJ, Case C-456/02 *Trojani* [2004] E.C.R. I-7573.

272 See, most recently, Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, [2001] O.J. L81/1(this regulation, however, does not apply to Ireland and the United Kingdom).

273 Directive 2004/38, Article 5(1).

274 Chapter VI of Directive 2004/38.

grounds have to be interpreted restrictively,[275] and are much more stringent than the grounds justifying a refusal of entry of third country nationals (which are not otherwise covered by Union law). Indeed, an alert in the Schengen Information System, obliging other States to refuse a visa to the Schengen area to the third country national concerned, can be issued on grounds of public policy and security which are much more loosely defined than the same concepts in the Directive 2004/38.[276] As a result, the existence of such an alert cannot be deemed sufficient in itself for refusing entry of Union citizens, which benefit of the more stringent conditions of Directive 2004/38.[277]

More importantly, OCT nationals can rely on Directive 2004/38 in order to challenge possible restrictions on travels to the Member States imposed by the OCT to which they belong, *i.e.* exit restrictions rather than entry restrictions. This is the main consequence of the application of Article 21 TFEU to travels between the OCTs and the Member States. As the Court held in *Jipa*: "the right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin".[278] Article 4 of Directive 2004/38, for its part, states that

> "1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.
> 2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies."

Consequently, Directive 2004/38 leaves very little scope for exit restrictions. They may only be imposed if they are justified by one of the grounds mentioned in Chapter VI of the Directive, namely grounds of public policy, public security or public health.[279] If an OCT were to impose exit requirements that made travels to another Member State excessively difficult this would, in the absence of due justification on one of the grounds just stated, be in violation of Article 21 TFEU, even if it applied without distinction to all Union citizens.[280] Moreover, in this connection, there would be no need for the Union citizen

---

275 See *e.g.* ECJ, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] E.C.R. I-5257, paras 64-65; ECJ, Case C-348/96 *Calfa* [1999] E.C.R. I-11, para. 23; ECJ, Case 30/77 *Bouchereau* [1977] E.C.R. 1999, para. 33;ECJ, Case 36/75 *Rutili* [1975] E.C.R. 1219, para. 27.

276 See Schengen Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, [2000] O.J. L239/19, Articles. 5, 15 and 96. See also: Declaration by the Executive Committee established by the CISA of 18 April 1996 defining the concept of alien, [2000] O.J. L239/19, stating that in the context of the aforementioned Article 96, persons who are covered by Union law should not in principle be placed on the joint list of the persons to be refused entry.

277 ECJ, Case C-503/03 *Commission v Spain* [2006] E.C.R. I-1097, paras 48-53.

278 ECJ, Case C-33/07 *Jipa* [2008] E.C.R. I-5157, para. 18. See the discussion in Oosterom-Staples, "Het fundamentele recht op vrij verkeer nader bepaald: het arrest Jipa onder de loep" (2009) *N.T.E.R.*, 12-17.

279 See, with regard to these grounds, ECJ, Case C-33/07 *Jipa* [2008] E.C.R. I-5157, paras 21-29 and the detailed discussion in Chapter 4, *infra*.

280 Non-discriminatory obstacles have been held to infringe Article 21 TFEU on many occasions. For one example, see ECJ, Case C-353/06 *Grunkin and Paul* [2008] E.C.R. I-7639. See also the discussion in Van Nuffel and Cambien, "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren" (2009) 57 *SEW*, 144-154.

concerned to establish a further connection with Union law.[281] One example could be the imposition of "departure taxes" by an OCT authority on persons travelling abroad.[282] The same is true *a fortiori* where an OCT would prohibit its nationals to travel to one of the Member States as such would come down to an outright negation of the Article 21 TFEU rights to these nationals. The foregoing reasoning does not apply, however, to restrictions on travels between the OCTs and the Member States in purely internal situations. Accordingly, a Member State could restrict the freedom of its nationals to travel from the OCT to the European territory of the Member State to a further extent than would be allowed under Article 21 TFEU, as long as any link with Union law is absent. This will be discussed more in detail in the following.

ii) Rules issued by the associated Member State

In the foregoing I reached the conclusion that movement between the OCTs and the Member States for OCT nationals is subject to the same (substantive) rules as those applicable to Union citizens travelling between the Member States. Still, OCT nationals could be made subject to more burdensome conditions than other Union citizens, at least when entering the Member State to which the OCT belongs (*e.g.* a Dutch national travelling between Aruba and the Kingdom of the Netherlands). This is because the situation occurring constitutes, under certain circumstances at least,[283] a purely internal situation, to which Union law, including Article 21 TFEU, does not apply.[284] In such purely internal situations a Member State may adopt measures which treat its own nationals less favourably than nationals of other Member States.[285] Moreover, in such situations, Union law does also not object to a differential treatment of two categories of a Member State's own nationals, given the fact that Union law is simply not applicable.[286] It would seem to follow that an associated Member State is allowed to subject the right of

281 This presumably follows from ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., paras 48-56. The actual meaning of the judgment and its implications for the scope of Union law cannot, however be determined with certainty at present. Future case law must further clarify the matter.

282 Example cited in Kochenov, "The impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community" (2009) 36 *LIEI*, 254 (footnote 84). Many countries around the globe employ a system of departure taxes. One example is Cuba: http://www.iatatravelcentre.com/CU-Cuba-customs-currency-airport-tax-regulations-details.htm.

283 Namely: where any link with Union law is absent. Such a link would be present, for instance, where an OCT national had previously resided on the territory of another Member State (see the discussion, *infra*). The status of Union citizen would arguably not be sufficient in itself to provide a sufficient link with Union law in order to invoke Union law against a national measure restricting movement from an OCT to the associated Member State. Indeed, the *McCarthy* and *Ruiz Zambrano* case law (see the discussion in Chapter 4, *infra*) would arguably not apply to such a case because the national measure concerned would not have the effect of depriving the OCT nationals concerned of the genuine enjoyment of the substance of their citizenship rights or of impeding the exercise of their right of free movement to another Member State. The reason is, arguably, that the national measure concerned would not restrict the possibilities to travel to other Member States. Against such restrictions, by contrast, reliance on Article 21 TFEU *would* be possible, as was discussed higher.

284 See, *e.g.*, ECJ, Case 175/78 *Saunders* [1979] E.C.R. 1129 (an internal restriction on a national's freedom of movement within his Member State) cannot be challenged under Union law). This remains true after the introduction of the provisions on citizenship of the Union: ECJ, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171, para. 23.

285 See the discussion in Chapter 2, under IV.B.2 and the references cited there. For an illustration in the case law of the ECJ, see, *e.g.*, ECJ, Case C-379/92 *Peralta* [1994] E.C.R. I-3453, para. 27.

286 See *e.g.* ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683.

entry of its OCT nationals to more burdensome conditions than it does for its non-OCT nationals and for other Union citizens, at least in situations in which no other link with Union law is present.

This point of view was confirmed in the debates surrounding a number of legislative proposals that were put forward in the Netherlands in the context of its recently developed policy aim of integrating immigrants. At present, third country nationals who wish to settle permanently in the (European part of the) Netherlands are subject to a "duty of civic integration" ("inburgeringsplicht"),[287] which takes the form of a civic integration test ("inburgeringstest").[288] Union citizens are exempt from this duty, and the same is true for nationals of certain third countries such as States party to the EEA Agreement,[289] Switzerland, the USA, Australia, Canada, New-Zealand and Japan (see Article 5 of the civic Integration Act).[290] An initial proposal for this law sought to subject Arubans and Antilleans to the "duty of civic integration", unlike all other Union citizens.[291] This proposal did not make it into law after the Dutch Council of State had issued a negative advisory opinion.[292] All Dutch nationals are now in principle exempt from the said duty.[293]

---

287 The possibility of subjecting third country nationals to integration conditions is explicitly authorised under Union law by Article 5(2) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] O.J. L16/44.

288 Wet van 30 november 2006 houdende regels inzake inburgering in de Nederlandse samenleving (Wet inburgering), [2007] Stb. 444, Article 3 in particular (*hereinafter*: "Civic Integration Act"). Before obtaining a temporary residence permit in the Netherlands, another, more basic, integration test must be passed under the in verband met het stellen van een inburgeringsvereiste bij het toelaten van bepaalde categorieën vreemdelingen (Wet inburgering in het buitenland), [2006] Stb. 28 (*hereinafter*: Act on Civic Integration Abroad). See the discussion in Besselink, "Integration and Immigration: The Vicissitudes of Dutch *'Inburgering'*", in Guild, Groenendijk and Carrera (eds.), *Illiberal liberal states: immigration, citizenship, and integration in the EU* (Farnham, Ashgate Publishing, 2009), 241-258. For a detailed discussion in Dutch, see de Vries, *PS-special: Wet inburgering*, (Deventer, Kluwer, 2007), 319 pp.

289 Agreement and on the European Economic Area, [1994] O.J. L1/3 concluded on the part of the EU by Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, [1994] O.J. L1/1.

290 For an evaluation of the validity and desirability of these exemptions, see Carrera and Wiesbrock, "Civic Integration of Third Country Nationals: nationalism versus Europeanisation in the Common EU Immigration Policy", *CEPS Liberty and Security in Europe Series*, *available at* www.ceps.eu/ceps/download/2179.

291 See Besselink, "Expulsion and Integration: Erecting Internal Borders Within the Kingdom of the Netherlands" (2006), *available at* http://www.libertysecurity.org/article1096.html. See also the more concise version of the article published as Besselink, "De Binnengrenzen van het Koninkrijk, of: Het voorontwerp 'Verbanning en Inburgering'" (2006) *Tijdschrift voor Antilliaans Recht – Justicia*, 70-84; Jessurun d'Oliveira, "TweederangsNederlanders: de Antillianen" (2006) *Migrantenrecht*, 88-99.

292 Advies van 1 juli 2005 bij Voorstel van wet houdende regels inzake de inburgering in de Nederlandse samenleving (Wet inburgering), met memorie van toelichting, *Kamerstukken* II 2005/06, 30308, nr. 4. See also Advies van 3 augustus 2006 bij Nieuwe adviesaanvraag inzake het wetsvoorstel houdende regels inzake inburgering in de Nederlandse samenleving (wet inburgering), *Kamerstukken* II 2005/06, 30 308, nr. 106.

293 Still, Article 4 of the Civic Integration Act kept open the possibility of subjecting certain categories of Dutch nationals to the "duty of civic integration" by a later decision until this possibility was deleted from the Act by a more recent law (Wet van 12 juni 2008 tot wijziging van de Wet inburgering en enkele andere wetten in verband met het vervallen van de mogelijkheid om Nederlandse onderdanen tot inburgering te verplichten en het aanbrengen van enkele technische verbeteringen, [2008] Stb. 229).

It is illuminating to look at the negative advisory opinion of the Dutch Council of State in a bit more detail, because it has a clear line of reasoning with regard to the possibility for associated Member States to impose burdens on the free movement rights of their own nationals. Admittedly, the main arguments that led the Council of State to issue a negative opinion were based on considerations of national law [294] and international law. [295] Interestingly, the Council of State also explicitly considered whether the proposal violated Union law. It started by pointing out that the proposal would lead to subjecting only certain categories of Dutch nationals to the said integration duty, namely only Arubans and Antilleans. These categories would be treated less favourably than other Dutch nationals and other Union citizens, who would be exempt from this duty. Next, the Council of State pointed out that Union law does not object to such differential treatment in purely internal situations. It distinguished between two situations. Some Arubans and Antilleans will never have exercised their free movement rights before they travel to the Netherlands. Their situation is that of a Dutch national travelling between two parts of his Member State, which is a purely internal situation.[296] Union law does not apply to such a situation, so reverse discrimination is possible, as far as Union law is concerned. Different is the situation of Arubans or Antilleans who have exercised their free movement rights under Union law before travelling to the Netherlands. Take the example of an Antillean taking a flight from Willemstad to Paris, and then taking a train from Paris to Amsterdam. This person has first exercised his right to enter the territory of another Member State, before entering a different part of his own Member State. Through the sheer exercise of this right he has, according to the Council of State, brought himself within the scope of application of Union law.[297] As a consequence Union law applies, including the equal treatment clause of Article 18 TFEU. This means that the differential treatment in question will constitute a violation of Union law, unless it can be objectively justified. This was not the case according to the Council of State. Moreover, it can be added, it also entails the applicability of Directive 2004/38, which does not allow the imposition of integration requirements, in contrast with Directive 2003/109.[298]

The Council of State had the opportunity to elaborate this reasoning further in relation to another controversial legislative proposal. Indeed, next to and apart from its proposal to subject Antilleans and Arubans to the duty of civic integration, the Dutch government proposed another set of measures targeted explicitly at Antilleans and Arubans wishing to settle in the European part of the Netherlands.[299] The proposal provided for the possibility of sending back to their home country certain groups of Antillean and Aruban youngsters who had proven to be a burden for the Dutch society.[300] Again, this measure would only

294 A violation of the equal treatment clause in Article 1 of the Dutch constitution.

295 A violation of Article 14 of the ECHR.

296 ECJ, Case 175/78 *Saunders* [1979] E.C.R. 1129.

297 This is consistent with the case law of the European Courts. See *e.g.* ECJ, Case C-224/98 *D'Hoop* [2002] E.C.R. I-6191.

298 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] O.J. L16/44.

299 Voorstel van wet van 30 januari 2006 houdende aanvullende maatregelen inzake onder meer de terugzending van Antilliaanse en Arubaanse risicojongeren, met memorie van toelichting; Gewijzigd voorstel van wet houdende aanvullende maatregelen inzake onder meer de terugzending van Antilliaanse en Arubaanse risicojongeren, met memorie van toelichting.

300 For a detailed exposition and analysis of its provisions, see Besselink, "Expulsion and Integration: Erecting Internal Borders Within the Kingdom of the Netherlands" (2006), *available at* http://www.libertysecurity.org/article1096.html. The issue of dealing with problems caused by young Antillean immigrants has been on the political agenda in the Netherlands since the nineties. Earlier

apply to (certain groups of) Antilleans and Arubans, but not to other Dutch nationals and other Union citizens.[301]

The Council of State again issued a negative opinion,[302] after explicitly considering *inter alia* whether the proposal violated Union law. It distinguished basically between the same two situations set out above. It held that Union law does not apply to (and cannot be violated therefore in) the situation of Arubans and Antilleans travelling directly from the Dutch OCTs to the Netherlands, because this constitutes a purely internal situation. However, Arubans and Antilleans travelling to the Netherlands via another Member State, bring themselves within the ambit of Union law. Applying the special expulsion measure laid down in the proposal to them would infringe Union law, as that measure was not conform Directive 2004/38, which sums up the permissible conditions for expelling Union citizens from the territory of one of the Member States (Article 27 *et seq*.).[303] Moreover, the measure was discriminatory, given the fact that it could not be applied to other Union citizens, and this discrimination could not be justified. This proposal did not make it into law either, but plans for reintroducing it exist, in particular after the formation of a right-wing government in October 2010.[304]

The foregoing discussion probably illustrates one key point: an associated Member State may subject OCT nationals belonging to that Member State to more burdensome entry conditions than other Union citizens as long as any connection with Union law is absent. Such a connection will be present if an OCT national has travelled to another Member State before entering his associated Member State. The reasoning of the Dutch Council of State is probably correct, as it is consistent with a whole body of case law concerning purely internal situations.[305] It finds perhaps the most explicit approval in the *Kaur* case, dealing with a British Overseas citizen who wanted to secure a right of residence in the UK. In his opinion to the case AG Léger remarked that:

> "from the strictly legal point of view, Mrs Kaur's application does not seek recognition of a right to move freely within [Union] territory but seeks rather to secure the right to reside within the

---

proposals to remedy these problems included the idea of introducing visa requirements for Antilleans and Arubans wishing to travel to the Netherlands. This proposal was abandoned, especially because it would not be feasible to implement it under current Dutch nationality legislation, which does not distinguish between Dutch citizens from the Netherlands and Dutch citizens from overseas (see the discussion in De Groot, "Visumplicht Antillianen/Arubanen en het Europese burgerschap" (2000) *Migrantenrecht*, 51-52).

301 And, in contrast to the proposal on the civic duty, not even to third country nationals.

302 Advies van 26 januari 2007 bij Gewijzigd voorstel van wet houdende aanvullende maatregelen inzake onder meer de terugzending van Antilliaanse en Arubaanse risicojongeren, met memorie van toelichting, *Kamerstukken* II 2006/2007, 30 962, nr. 4 en Advies van 1 september 2006 bij Voorstel van wet houdende aanvullende maatregelen inzake onder meer de terugzending van Antilliaanse en Arubaanse risicojongeren, met memorie van toelichting, Kamerstukken II 2006/07, 30 962, nr 4.

303 Besselink further clarifies the point: the proposed expulsion measures would violate Article 27(2) of the Residence Directive for two reasons: they would rest on considerations of general preventions and moreover not be based exclusively on the personal conduct of the individual concerned: Besselink, "Expulsion and Integration: Erecting Internal Borders Within the Kingdom of the Netherlands" (2006), *available at* http://www.libertysecurity.org/article1096.html.

304 See Nieuwenhuis, "Mogen we Antillianen terugsturen?", (17 September 2010) *De Pers*, *available at* http://www.depers.nl/binnenland/510038/Mogen-we-Antillianen-terugsturen.html.

305 See, among numerous examples, *e.g.* ECJ, Case 175/78 *Saunders* [1979] E.C.R. 1129; ECJ, Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] E.C.R. 3723; ECJ, Case 44/84 *Hurd v Jones* [1986] E.C.R. 29; ECJ, Case 180/83 *Moser v Land Baden-Württemberg* [1984] E.C.R. 2539; ECJ, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171.

> territory of the Member State of which, according to that Member State's domestic law, she possesses a form of nationality."[306]

He therefore concluded that any connection with Union law was lacking.[307] This case law remains good law, and has, despite the strong objections sometimes raised against it,[308] been confirmed by the Union Courts.[309]

The end result seems to be that OCT nationals may, in certain circumstances, be treated less beneficially than all other Union citizens. Obviously, this conclusion is reached considering Union law only and can, therefore, only be partially true. It is important to stress that we are not only dealing here with a situation of reverse discrimination, *i.e.* nationals being treated less favourably by their Member State than other Union citizens. Another important aspect of the situation at hand is that one group of Member State nationals (OCT nationals) is being treated less favourably than other nationals of the same Member State. This has two important consequences.

In the first place, this differential treatment could potentially violate domestic law, *e.g.* a non discrimination principle written into the national constitution.[310] Interesting to note in this regard is that the ECJ has explicitly remarked that:

> "interpretation of provisions of [Union] law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from [Union] law in a situation considered to be comparable by that court".[311]

The ECJ is hinting here at the fact that national courts could, as regards purely internal situations, use a reasoning analogous to the one employed at the Union level and find an infringement of the principle of equal treatement.[312] This view is probably inspired by the fact that any other solution might be such as to allow erecting "internal borders" within a Member State, something which according to some, sits uneasily with the whole idea of an

---

306 Opinion of AG Léger in Case C-192/99 *Kaur* [2000] E.C.R. I-1237, para. 29.

307 Opinion of AG Léger in Case C-192/99 *Kaur* [2000] E.C.R. I-1237, para. 30.

308 See, *e.g.*, Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, paras 121 *et seq.*

309 See, *e.g.*, ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683. See also the detailed discussion in Chapter 4, *infra*.

310 The first opinion of the Dutch Council of State discussed above illustrates the point: the Council held that the legislative proposal violated the principle of equal treatment enshrined in Article 10 of the Dutch Constitution. In other words: it found a forbidden discrimination even in those situations to which Union law did not apply. Jessurun d'Oliveira, by contrast, has argued that the Dutch Constitution does not oppose subjecting Antilleans and Arubans to different requirements when travelling to the Netherlands (Jessurun d'Oliveira, "TweederangsNederlanders: de Antillianen" (2006) *Migrantenrecht*, 90-91). See also the discussion in Besselink, "Inburgering, gelijke behandeling en verblijfsrecht van vreemdelingen in Nederland " (2004), *available at* http://www.libertysecurity.org/IMG/pdf/Inburgering_voorstudie.pdf.

311 ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 40. See the discussion in Van Elsuwege and Adam, "Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance flamande" (2008) *C.D.E.*, 655-711.

312 The Belgian Constitutional Court did not follow this suggestion and only declared the disputed national rule to be invalid in as far as it concerned situations having a link with Union law. See the discussion in Van Elsuwege and Adam, "The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination. Constitutional Court of Belgium, Judgment 11/2009 of 21 January 2009" (2009) *EuConst.*, 327-339.

internal market, defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" (Article 26(2) TFEU) or the objective of construing a Citizens' Europe.[313] Applied to the situation under discussion here, this means that OCT nationals should preferably not be made subject to more burdensome conditions than other nationals of the Member State concerned.

In the second place, such differential treatment may violate international obligations stemming from fundamental rights treaties. I will mention them only briefly here, as I am principally concerned with the validity of such treatment under Union law. As far as international law is concerned, the situation described could violate the equality principle laid down in Article 14 ECHR[314] and Article 26 of the ICCPR or the right to respect for family life.[315] Besides, on a wholly different line of reasoning, one could argue that the situation described violates the right to enter one's own State, which is a fundamental right. Article 3(2) of the Fourth Protocol to the ECHR provides: "No one shall be deprived of the right to enter the territory of the State of which he is a national".[316] Furthermore, Article 2(1) of the Fourth Protocol provides that: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence". One could argue that the differential treatment discussed here could potentially make it excessively difficult for OCT nationals to enter the European territory of their associated Member State, which is the State of their nationality. However, the argument faces two major flaws. First of all, the fourth protocol has not been ratified by certain EU Member States, including the UK.[317] Consequently, the article finds no application to possible differential treatment of UK OCT nationals. Moreover, in the situation at hand, OCT nationals are (potentially) only prevented from entering *part of* the territory of their State. It is not clear whether such a situation violates the fundamental right mentioned. This doubt is confirmed by the declaration submitted by the Kingdom of the Netherlands at the moment of ratification of the Fourth Protocol to the ECHR[318]:

> "…the Netherlands and the Netherlands Antilles are regarded as separate territories for the application of Articles 2 and 3 of the Protocol, in accordance with Article 5, paragraph 4. Under Article 3, no one may be expelled from or deprived of the right to enter the territory of the State of which he is a national. There is, however, only one nationality (Netherlands) for the whole of the Kingdom. Accordingly, nationality cannot be used as a criterion in making a distinction between the "citizens" of the Netherlands and those of the Netherlands Antilles, a distinction which is unavoidable since Article 3 applies separately to each of the parts of the Kingdom. This being so, the Netherlands reserve the right to make a distinction in law, for purpose of the application of Article 3 of the Protocol, between Netherlands nationals residing in the Netherlands and Netherlands nationals residing in the Netherlands Antilles".

---

313 Again, I refer to the discussion in Chapter 2, under IV.B.2 and the references cited there.

314 This was precisely one of the arguments of the Dutch Council of State in the first opinion discussed above.

315 See ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 79.

316 This principle must also be respected in the context of the Union. See the explicit reference by the ECJ in ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 29.

317 For a list of declarations, reservations and other communications, see http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=046&CM=8&DF=&CL=ENG&VL=1.

318 Declaration contained in a letter from the Minister of Foreign Affairs, dated 9 June 1982, handed to the Secretary General at the time of deposit of the instrument of ratification, on 23 June 1982, Or. Fr.

A similar line of argument has been based on Article 12 of the ICCPR, which also provides for a right of entry into one's country.[319] However, in this connection too the Netherlands has made a declaration specifying that the Netherlands and the Netherlands Antilles are to be regarded as separate territories for the application of that Article.[320] Admittedly, the validity of such declarations can be called into question, in particular because they are outdated, since they refer to the Netherlands Antilles as the only Dutch overseas possession. Probably, however, the said declarations should be recognised as proof of a clear intention on part of the Netherlands when ratifying both international conventions to limit the right to enter one's country for Arubans and Antilleans to the Dutch overseas territories. For that reason, they could probably not be relied upon by Dutch OCT nationals to challenge restrictions such as expulsion measures against Antilleans or Arubans.[321]

An analogous interpretation can probably be put forward in relation to other Member States, like France and Denmark, even in the absence of a similar declaration. Indeed, the very reason why the above declaration was put forward is the existence of a single nationality for the whole Kingdom of the Netherlands, something which equally applies in the case of France and Denmark. On the other hand, one might reason that, in the absence of a similar declaration, the right concerned necessarily applies to the whole territory of the State in question, because otherwise the said declaration of the Netherlands would be superfluous. If this reasoning is correct, applying restrictions to OCT nationals wishing to enter the associated Member State could constitute a violation of the right to enter the home State. This argument has, to my knowledge, never been tested in court so far. In any event, both Article (3) of the Fourth Protocol to the ECHR and Article 12(3) of the ICCPR allow States to restrict the free movement rights of their nationals, if this provided for by law and necessary to achieve a legitimate objective.

One last remark seems useful here. One could be led to think that the above mentioned exclusion of OCTs from the scope of the Schengen agreement is an example of the associated Member State imposing more burdensome conditions on its OCT nationals. This is not the case however. First of all, it must be pointed out that we are not faced here with a purely internal situation, in which reverse discrimination is allowed. The exclusion from the Schengen Convention has for a consequence that different conditions apply for all Union citizens when travelling from OCTs to the European territory and this applies to all Member States, not just to the associated Member State. Moreover, the apparent exclusion of OCT nationals is not brought about by a unilateral decision of the associated Member State. Indeed, it results from clauses in the Schengen Convention (for France and the Netherlands) and in one of the accession agreements to this convention (for Denmark).[322]

---

319 See Besselink, "Inburgering, gelijke behandeling en verblijfsrecht van vreemdelingen in Nederland " (2004), *available at* http://www.libertysecurity.org/IMG/pdf/Inburgering_voorstudie.pdf.

320 Declaration and reservations of the Kingdom of the Netherlands, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

321 This conclusion is also reached by Jessurun d'Oliveira on the basis of a persuasive argumentation (see Jessurun d'Oliveira, "TweederangsNederlanders: de Antillianen" (2006) *Migrantenrecht*, 91-93).

322 See n. 264 and 267, *supra* and the accompanying text.

3. Conclusion

As Union citizens, OCT nationals enjoy within the territory of the Member States both the benefit of the economic free movement provisions and the general right to free movement laid down in Article 21 TFEU. Contrary to what has been argued in legal literature and even submitted, to some extent by the Commission, there is no need for a prior Council act adopted in accordance with Article 203 TFEU in order for these provisions to become applicable to OCT nationals. That view is at odds with the fact that OCT nationals are Union citizens enjoying within the territory of the Member States exactly the same rights as other Member State nationals and must, therefore, be rejected.

OCT nationals can, moreover, rely on the said provisions in order to obtain a right of entry into the territory of the Member States. Put differently, the free movement provisions can be relied upon to challenge restrictions on the right to travel from the OCTs to the territory of the Member States, with the exception of restrictions on the right to travel from an OCT to the associated Member State in purely internal situations. Consequently, the free movement provisions must be interpreted as guaranteeing a "one-way freedom of movement" from the OCTs to the Member States. This limited applicability of the free movement provisions to travels between the OCTs and the Member States is necessary in order to safeguard the *effet utile* of the provisions on Union citizenship and of the provisions on the association with the OCTs.

C. Electoral Rights

A second question to ask is what electoral rights OCT nationals enjoy. It will be recalled that Union citizens enjoy important electoral rights in both municipal elections and elections to the European Parliament. Article 22(1), first sentence, TFEU states that:

> "Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State".

Article 22(2), first sentence, TFEU, for its part, states that:

> "Without prejudice to Article 223(1)[323] and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State".

This right to vote and stand in municipal and European elections has to be exercised subject tot the conditions laid down in Council directives adopted for this purpose.[324]

---

323 Article 223(1) TFEU provides that the European Parliament is to draw up a proposal to lay down the provisions necessary for the election of its Members. The necessary provisions are then to be adopted by the Council, acting unanimously and after obtaining the consent of the European Parliament. These provisions can only enter into force after approval by the Member States in accordance with their respective constitutional requirements.

324 See Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] O.J. L329/34; Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for

Again, the difficult question is to what extent and under what conditions, OCT nationals enjoy the said electoral rights in municipal and European elections. It is clear that OCT nationals can invoke the rights laid down in Article 22 TFEU when they reside in (the European territory of) a Member State of which they are not a national. The question is, however, whether these rights also apply *ratione loci* in the OCTs, *i.e.* when they reside in the OCT of a Member State of which they are not a national.

A first intuitive reflex might be to remark that a similar analysis has just been carried out with regard to Article 21 TFEU, and that there should be no need to do it all over again with regard to Article 22 TFEU. It may seem at first sight that, given the similarities between Articles 21 and 22 TFEU, largely the same reasoning can apply for both Treaty provisions. Indeed, just as Article 21 TFEU, Article 22 TFEU confers rights on "every citizen of the Union", which indubitably includes OCT nationals as defined above. And, just like Article 21 TFEU, Article 22 TFEU is not traditionally considered to be amongst the provisions (fully) applicable to the OCTs. However, one should not fail to observe one fundamental difference between Article 21 TFEU and Article 22 TFEU. Article 21 TFEU, on the one hand, confers on every Union citizen an independent right, namely the right to move and reside freely within the territory of the Member States, subject to certain conditions. Article 22 TFEU, on the other hand, does not confer any independent right in its own right. It merely proclaims that Union citizens residing in a Member State of which they are not a national have the right to participate in municipal and European elections "under the same conditions as nationals of that Member State". In this sense, Article 22 TFEU, far from conferring an independent right on Union citizens, should rather be viewed as applying the principle of non-discrimination on grounds of nationality to the exercise of the right to vote in municipal and European elections.[325]

It follows that the scope of Article 22 TFEU can only be determined by way of a "phased" reasoning. One must start from the observation above: Article 22 TFEU merely applies the principle of non-discrimination to pre-existing electoral rights, regulated independently from Article 22 TFEU. The scope of Article 22 TFEU is first and foremost determined, therefore, by the (national and EU) provisions that determine the electoral rights in question (phase 1). Article 22 TFEU only produces its effect in a second phase: once the scope of the pre-existing right is determined, it will enlarge it in order to guarantee, under certain conditions, equal treatment for all Union citizens, irrespective of their nationality (phase 2). In the following I will, in that order, consider these two "phases". It will become clear that both are highly relevant with regard to determination of the electoral rights of OCT nationals. I will do this exercise first with regard to Article 22(2) TFEU and next with regard to Article 22 (1) TFEU.

1. Elections to the European Parliament

---

the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] O.J. L368/38.

325 See ECJ, Case C-145/04 *Spain v United Kingdom* [2006] E.C.R. I-7917, para. 66. For a detailed discussion of Article 22 TFEU, see Shaw *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge, Cambridge University Press, 2007), Chapter 5 in particular.

a) Phase 1: national and EU provisions

i) General situation

The procedure surrounding the right to vote and stand as a candidate in elections to the European Parliament is partly regulated by Union law itself and partly by the national provisions of each Member State. As far as Union law is concerned, the most important provisions are Articles 14 and 223 TFEU[326] and the Act of 1976 concerning the election of the representatives of the European Parliament by direct universal suffrage,[327] adopted using the procedure of Article 190(4) TEC (now Article 223(1) TFEU).[328] Originally, Article 190(4) TEC[329] provided for the adoption of a *uniform* election procedure in all Member States, but since the entry into force of the Amsterdam Treaty there is also the option to provide for an election procedure "in accordance with principles common to all Member States". The 1976 Act, as modified in 2002, essentially implements the latter option. Article 1 of the Act provides that members of the European Parliament are to be elected on the basis of proportional representation and that elections are to be by direct universal suffrage and free and secret. Article 8 specifies that, subject to the provisions of the Act, the electoral procedure is to be governed in each Member State by its national provisions. It is added that those provisions, which may if appropriate take account of the specific situation in the Member States, must not affect the essentially proportional nature of the voting system.

It is already clear from this that the EU provisions relating to the European Parliamentary election procedure are characterised by a great degree of deference to the Member States. Union law itself does not determine in any great detail the personal and territorial scope of European Parliamentary elections. As far as the personal scope is concerned, Article 14(2) TEU merely states that the European Parliament is to be composed of "representatives of the Union's citizens". Previously, Article 189 TEC stated that the European Parliament was to consist of "representatives of peoples of the States brought together in the [Union]".[330] The precise meaning of this expression was the subject of the dispute in *Spain v United Kingdom*.[331] Spain argued that the expression had to be understood as

---

326 These articles correspond more or les to former Articles 189 and 190 TEC.

327 Act concerning the election of the representatives of the European Parliament by direct universal suffrage annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, [1976] O.J. L278/1, as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002, [2002] O.J. L283/1. See the recent Commission report dealing with possible problems in the implementation of the act: Commission Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC), COM(2010) 605/2.

328 Article 223(1) TFEU requires the European Parliament to draw up a proposal for elections by direct universal suffrage, after which the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, is to lay down the appropriate provisions, which then have to be adopted by the Member States in accordance with their respective constitutional requirements.

329 Old Article 138(3) TEEC.

330 Similar references could be found in Articles 190(1) and (2) TEC and in Article 1 of the annex to the 1976 decision.

331 ECJ, Case C-145/04 *Spain v United Kingdom* [2006] E.C.R. I-7917. To support this argument, Spain submitted that Articles 189 and 190 TEC had to be read together with Article 17 and Article 19 TEC.

referring to Union citizens only.[332] The ECJ disagreed. It started its analysis by observing that neither Article 190 TEC nor the 1976 Act expressly and precisely defined who were to be entitled to the right to vote and to stand as a candidate in elections to the European Parliament.[333] Furthermore, it refused to accept Spain's argument of an inextricable link between Union citizenship and the right to vote and to stand as a candidate for the European Parliament.[334] This brought the ECJ to a simple and straightforward conclusion: in the current state of Union law the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament fell within the competence of each Member State, in compliance with Union law.[335] The ECJ came to a similar conclusion in *Eman and Sevinger*, which was pronounced the very same day.[336] In line with this statement the ECJ considered that it was lawful for Member States to extend the right to vote in European Parliamentary elections to certain groups of third country nationals (the contentious issue in *Spain v United Kingdom*) or to exclude certain groups of Union citizens from the right to participate in European Parliamentary elections, such as certain groups of OCT nationals (the contentious issue in *Eman and Sevinger*).[337] The ECJ added, however, that such arrangements needed to be in accordance with Union law. However, as was already remarked, since the entry into force of the Lisbon Treaty, the Treaties no longer make reference to "representatives of peoples of the States", but instead state that the European Parliament is composed of "representatives of the Union's citizens" (Article 14(2) TEU). The possible consequences of this changed wording will be discussed below.

As far as the territorial scope of European Parliamentary elections is concerned, Article 1 of the 1976 Act merely notes that MEPs are elected "in each Member State". Before the entry into force of the Lisbon Treaty, this was also stated in Article 190(2) TEC.[338] Under the traditional reading of the Treaties, this is to be understood as referring to the territories of the Member States, excluding the OCTs.[339] Indeed, Articles 189 and 190 TEC are, in accordance with the *Leplat* case law, not among the provisions applicable to the OCTs and this was explicitly confirmed by the ECJ in *Eman and Sevinger*.[340] The consequence is that, as far as Union law is concerned, Member States are not required to hold elections to the European Parliament in the OCTs. On the other hand, it would seem that Union law does not bar the Member States from doing so either. The bottom-line is that, just like the personal scope, the territorial scope is to be determined largely by the Member States, on condition that they respect Union law.

It is clear from the foregoing that the scope of European Parliamentary elections is determined first and foremost by the Member States. However, in exercising this

---

332 *Ibid.,* paras 37-45.

333 *Ibid.,* para. 70.

334 *Ibid*., para. 76.

335 *Ibid*., para. 78.

336 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, paras 40-45.

337 See the discussion in Shaw, "The Political Representation of Europe's Citizens" (2008) 4 *EuConst*, 162-186.

338 The Treaties no longer contain this statement, since the exact composition is now to be determined by the European Council with the consent of the European Parliament (Article 14, second subpara., TEU). It is clear, however, that in any event elections will continue to be held in each Member State since for each Member State minimum six members need to be elected (Article 14(2), first subpara., TEU). In this connection it must be remarked that the composition laid down in Article 190(2) TEC remained provisionally in place even after the entry into force of the Lisbon Treaty (see Protocol (no 36) on Transitional Provisions, [2010] O.J. C83/322, Article 2, second para.).

339 See under III.A.3.a., *supra.*

340 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 46.

competence, the Member States must comply with Union law, a point which I will elaborate below when studying the recent changes in the Netherlands electoral law.[341] All this is extremely relevant with regard to the electoral rights of OCT nationals. The large discretion left to the Member States in this context means that a Member State could opt, for instance, to restrict the right to participate in European Parliamentary elections to those of its nationals having a sufficient connection with the mainland and exclude, on that basis, persons having their residence in a third country or one of the OCTs.[342]

Accordingly, nationals resident in the Danish[343] and UK OCTs are not generally speaking entitled to vote in European Parliamentary elections. To illustrate this exclusion, I will elaborate the example of the UK in some more detail. In the UK, elections to the European Parliament are organized in the UK only and not in the British OCTs. This follows from the European Parliamentary Elections Act 2002 which, for the election of MEPs, divides the UK in nine electoral regions, all of which are located in England, Scotland, Wales, and Northern Ireland.[344] The British legislator[345] intentionally excluded the British OCTs and Gibraltar, to comply with annex I (original annex II) to the 1976 Act which stated "The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom". However, in 1999, the ECtHR ruled that the exclusion of Gibraltar from enfranchisement in European Parliamentary elections was a breach of human rights.[346] In reaction to this judgment, and in order to honour its obligations under the ECHR, the UK authorities combined Gibraltar with the South West region of England,[347] so as to create a new "combined" electoral region for European Parliamentary Elections.[348] As a consequence, the entirety of UK electoral law as it applies to European Parliamentary elections is to be applied to Gibraltar for those purposes, modified as necessary to ensure practical application. Besides, only British nationals (including British citizens and "Qualified Commonwealth Citizens (QCCs)"[349]) and Irish citizens[350] resident in the UK

---

341 See under III.C.1.a.ii., *infra.* The point is also made clear in the Commission Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC), COM(2010) 605/2, at 3.4.

342 This was explicitly confirmed by the ECJ in *Eman and Sevinger* (see the discussion, *infra*). Conversely, Member States may choose to grant that right to certain persons who have close links to them, other than their own nationals or Union citizens resident in their territory (See ECJ, Case C-145/04 *Spain v United Kingdom* [2006] E.C.R. I-7917, para. 78). See the discussion in Mehdi, "La Citoyenneté européenne", in Tesoka and Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité* (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 40-47.

343 Greenland was a constituency for elections to the European Parliament in 1984. However, since it became an OCT (in 1985; see under II.A.3., *supra*), elections to the European Parliament are no longer organized in Greenland and permanent residents in Greenland are not entitled to vote in elections to the European Parliament. See the "Members of the European Parliament Elections Act (Consolidated Act No. 143 of 24 February 2009)", Articles 2(3) and 3(2), *available* in English at http://elections.sm.dk/european-parliament-elections/Documents/EPL2009uk.pdf.

344 European Parliamentary Elections Act 2002 (c.24), Article 1.

345 By the European Parliamentary Elections Act 1978, consolidated in 2002 by the European Parliamentary Elections Act 2002.

346 *Matthews v UK* (28 EHRR 361).

347 In accordance with section 9 of the European Parliament (Representation) Act 2003 ("the EPRA 2003"), which provided that Gibraltar was to be combined with an existing electoral region in England and Wales to form a new electoral region for the purposes of European Parliamentary elections taking place after 1 April 2004.

348 See the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004.

349 Commonwealth citizens satisfying certain special conditions (see *e.g.* EPRA 2003, Article 16(5). QCCs may vote in European Parliamentary elections if they are resident in Gibraltar, which, for this

(or formerly resident in the UK[351]) are entitled to vote in European Parliamentary elections in the UK.[352] Nationals resident in the British OCTs, by contrast, will not normally be so entitled.

Traditionally, France was the only Member State with OCTs which conferred on its nationals resident in the OCTs a full-blown right to participate in European Parliamentary elections. The French law on the election of representatives to the European Parliament is applicable to the French overseas territories, which include territories qualifying for OCT status and territories qualifying for outermost region status (see the discussion under II.A.2., *supra*).[353] In fact, the French overseas territories are one of the currently eight electoral departments for the elections of the European Parliament in France, which are all allocated a certain share of the total number of representatives to elect. Consequently, not only are elections to the European Parliament organised in the OCTs, the French OCTs are also guaranteed a fixed number of representatives in the European Parliament.[354] Accordingly, of the current 72[355] representatives of France in the European Parliament, three were elected in the French Overseas Departments.[356] From the point of view of Union law, this can be seen as an extension of the scope of the election procedure in European Parliamentary elections. Indeed, as I remarked higher, France is not required to organize elections in its OCTs. From the point of view of French law however, the French overseas territories form an entire part of the French Republic, in accordance with the constitutional principle of the "indivisibilité de la République". French citizens resident in these territories participate in elections of the National assembly[357] and the Senate[358] in

---

purpose, forms part of the UK. See, on this issue, ECJ, Case C-145/04 *Spain v United Kingdom* [2006] E.C.R. I-7917 and the discussion in Shaw, "The Political Representation of Europe's Citizens" (2008) 4 *EuConst*, 162-186

350 See the Representation of the People Act 1983, as modified by the Representation of the People Act 2000, Article 1. See, in great detail: Jackson, Leopold and Phillips *Constitutional and Administrative Law* (8th ed.) (London, Sweet and Maxwell, 2001), 213 *et seq*.

351 See the Representation of the People Act 1985, ss. 1-3.

352 European Parliamentary Elections Act 2002 (c.24), Article 8(1)-(4).

353 See Article 26 of Loi n°77-729 du 7 juillet 1977 relative à l'élection des représentants au Parlement européen, which in turn refers to various articles of book V of the *code électoral*. See further: Décret n°79-160 du 28 février 1979 portant application de la loi n°77-729 du 7 juillet 1977 relative à l'élection des représentants au Parlement européen, Chapitre V: 'Dispositions relatives à l'outre-mer'.

354 Article 3-1 of of Loi n°77-729 du 7 juillet 1977 divides the electoral department constituted by the French overseas territories into three sections, namely the "Atlantic section" (which consists of Guadeloupe, French Guiana, Martinique, Saint-Barthélemy, Saint-Martin and Saint-Pierre and Miquelon), the "Indian ocean section" (which consists of Mayotte and Réunion) and the "pacific section" (which consists of New Caledonia, French Polynesia and Wallis and Futuna). The distribution of seats among these sections is regulated by decree.

355 See old Article 190(2) TEC.

356 See the website of the French Ministry of the interior (http://www.interieur.gouv.fr/sections/a_votre_service/resultats-elections/eur2004/008/index.html) and, for the 2004 elections, Décret n°2004-396 du 6 mai 2004 fixant le nombre de sièges et le nombre de candidats par circonscription et portant convocation des électeurs pour l'élection des représentants au Parlement européen.

357 Every French overseas territory gets to elect a certain number of deputies to the *Assemblée nationale*. The precise number and conditions for each territory can be found in the *Code électoral*, which has been significantly changed in this regard by Loi organique n° 2007-223 du 21 février 2007 portant dispositions statutaires et institutionnelles relatives à l'outre-mer, [2007] JORF. For example, Article L 394 of the *Code électoral* proclaims that two deputies will be elected in New Caledonia, two in French Polynesia and one in Wallis and Futuna.

358 Again, and similar to what is stated in the previous footnote with regard to the National Assembly, every French overseas territory is attributed a certain share of the total senators to elected. The precise numbers and conditions can again be found in the *Code électoral*, as modified by Loi

their own right. From the point of view of French constitutional law it is only normal then that they should also participate in elections to the European Parliament.

The Netherlands, until recently, excluded nationals resident in the OCTs from the right to vote in European Parliamentary elections. Since 2008 this is no longer the case. It is useful for my analysis to study the recent changes of the Netherlands electoral law in some detail, as it is a clear example of a policy change directly caused by an ECJ judgment on Union citizenship, namely the *Eman and Sevinger* case. In this respect, the recent changes can be compared to the changes in Irish legislation in the aftermath of the *Zhu and Chen* case. Besides, the case of the Netherlands perfectly illustrates that the discretion of the Member States in determining the procedures for European Parliamentary elections is limited by Union law and it provides some insight into the extent of these limitations.

ii) Case study: the Netherlands

The Netherlands Electoral Law ("Kieswet")[359] was the subject of the dispute in the already quoted *Eman and Sevinger* case.[360] At the time the case was brought, Article Y3a) of the *Kieswet* provided, with regard to elections to the European Parliament, that were entitled to vote[361]: "those who are entitled to vote in elections of members of the Tweede Kamer der Staten-Generaal (the Lower House of the Netherlands Parliament)[362]". Article Y3a) effectively referred to Article B1, which provided that[363]:

> "1. The members of the Tweede Kamer der Staten-Generaal shall be elected by persons who are Netherlands nationals on the date on which candidates are nominated and have attained the age of 18 on the date of the election, with the exception of those who, on the date on which candidates are nominated, are actually resident in the Netherlands Antilles or Aruba.
> 2. This exception shall not apply to:
> (a) Netherlands nationals who have been resident for at least 10 years in the Netherlands;
> (b) Netherlands nationals who work in the Netherlands public service in the Netherlands Antilles or Aruba, and their spouses, registered partners or cohabitants and children, provided that they live together with them."

---

organique n° 2007-223 du 21 février 2007 portant dispositions statutaires et institutionnelles relatives à l'outre-mer, [2007] JORF.

359 Wet van 28 september 1989, houdende nieuwe bepalingen inzake het kiesrecht en de verkiezingen.

360 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055. For more details, see the case notes by Besselink in (2008) 45 *CML Rev.,* 787-813 en in (2007) *N.T.E.R.,* 64-71; Shaw in (2008) 4 *EuConst,* 162-186; Claes in (2007) *SEW,* 216-221, Dawes in (2006) 3 *R.D.U.E,* 707-712 and Hervouët in (2006) *R.A.E.-L.A.E.,* 565-570.

361 I limit myself here to discussing the entitlement of Dutch nationals to vote in elections to the European Parliament, leaving aside for a moment the entitlement of other Union citizens to do so. The latter will be discussed under "phase 2", *infra*.

362 In the ECJ's judgment in *Eman and Sevinger* (ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 15) this part of the *Kieswet* was translated as "those who are not Netherlands nationals and are who are entitled to vote in elections of members of the Tweede Kamer der Staten-Generaal". That translation is plainly wrong. The original sentence in Dutch reads: "degenen die kiesgerechtigd zijn voor de verkiezing van de leden van de Tweede Kamer der Staten-Generaal", and this actually refers to "Dutch nationals", rather than excluding them. Other language versions of the judgment provide a more accurate translation. The French version, for instance, reads: "ceux qui ont le droit de voter à l'élection des membres de la Tweede Kamer der Staten-Generaal".

363 Translation taken from ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 14.

It followed from these articles that Dutch nationals were generally speaking not entitled to vote in elections to the European Parliament if they were actually resident in the Dutch OCTs and had not previously been living in the Netherlands for at least ten years. This meant in practice that Dutch OCT nationals were generally speaking not entitled to vote as long as they were resident in one of the OCTs, but became so entitled once they moved their residence to the Netherlands or to a third country.

The applicants in *Eman and Sevinger* were two Dutch OCT nationals resident in Aruba, one of the Dutch OCTs.[364] They submitted that their exclusion from the entitlement to vote in elections to the European Parliament infringed their rights under Article 22(2) TFEU. The ECJ started its analysis by pointing out that the Treaty provisions relating to European Parliamentary elections[365] do not, in accordance with the *Leplat* case law, apply to the OCTs and that the Member States are not required to hold elections to the European Parliament there.[366] Article 22(2) TFEU and Directive 93/109 could not change anything with regard to this conclusion as they are not relevant to the issue of voting rights of Dutch OCT nationals in the Netherlands.[367] *Prima facie* at least it was legitimate therefore to exclude Dutch nationals resident in the OCTs from participating in elections to the European Parliament. Still the ECJ came to the conclusion that the *Kieswet*, in the version set out above, violated the principle of equal treatment. The reason was not, it must be stressed, the choice of the Dutch legislator to exclude OCT nationals from elections to the European Parliament. In this regard, the ECJ confirmed that it is fully legitimate to exclude certain categories of nationals on the basis of their residence. The problem lay with the fact that the *Kieswet* conferred the right to vote in elections to the European Parliament on all Dutch nationals resident in a non-member country, but not on Dutch nationals resident in the Dutch OCTs. This differential treatment could not be justified by the Netherlands,[368] and therefore constituted a prohibited form of discrimination.[369]

The foregoing illustrates one key point. Union law does allow the Member States to exclude OCT nationals from the elections to the European Parliament, but not in a discriminatory way. In the case of the Netherlands, different options were discussed in order to remedy the observed violation of Union law.[370] One radical option would have

---

364 Both applicants are prominent Aruban politicians. Michiel Godfried Eman became in 2009 Aruba's fifth Prime Minister, while Oslin Benito Sevinger became Minister of Integration, Infrastructure and Environment. See also: Eman, "Defending the Democratic Rights of EU Citizens Overseas: a Personal Story", in D. Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 433-437.

365 Then Articles 189 TEC and 190 TEC.

366 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 47.

367 *Ibid*, para. 53 (Article 22(2) TFEU and Directive 93/109 concern only the voting rights of non-Dutch citizens of the Union residing in the Netherlands).

368 It was not apt to ensure that only Dutch nationals who had or had had links with the Netherlands were entitled to right to vote in and stand for elections to the European Parliament (ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, paras 59-60).

369 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 61.

370 Claes, "Zaak C-300/04, M.G. Eman en O.B. Sevinger t. College van burgemeester en wethouders van Den Haag en Zaak C-145/04 Koninkrijk Spanje t. Verenigd Koninkrijk van Groot-Brittanië en Noord-Ierland" (2007) *SEW*, 218; Besselink, "Nederlands postkoloniaal kiesrecht: het Europees Parlement en de Tweede Kamer" (2007) *N.T.E.R.*, 70. See also the preparatory documents to the legislative proposal eventually adopted (Memorie van toelichting - Wijziging van de Kieswet in verband met het verlenen van het kiesrecht voor de verkiezing van de leden van het Europees Parlement aan alle Nederlanders die in de Nederlandse Antillen en Aruba woonachtig zijn, *Tweede Kamer*, 2007-2008, 31 392, nr. 3).

been to change, through a declaration, the rules on Dutch nationality law for the purposes of Union law.[371] This was never seriously considered. That basically left the Dutch legislator with three options. First of all, the right to vote and stand as a candidate in elections to the European Parliament could be extended to Dutch nationals resident in the Dutch OCTs. As a consequence, Dutch OCT nationals would no longer be excluded from participation in European Parliamentary elections. Second, the right to vote and stand as a candidate could be restricted to Dutch nationals resident in the European Union. That would come down to excluding Dutch nationals resident in the OCTs and in third countries. A third option would be to grant the right to vote and stand as a candidate to all Dutch nationals who have been resident in the Netherlands for at least 10 years, irrespective of their place of residence, whether that is in Aruba, the Netherlands Antilles or a third country. Such would exclude all Dutch nationals who have never lived in the Netherlands for a substantial period of time.

The Dutch legislator has opted for the first possibility, by removing the residence based restrictions with regard to the right to vote in European Parliamentary elections. After the amendments of the *Kieswet* in 2008,[372] new Article Y3.a. provides that members of the European Parliament are elected by[373]:

> "persons who are Dutch nationals on the date on which candidates are nominated and have attained the age of 18 on the date of the election, with the exception of those who, have been deprived of their right to vote".

The consequence of this amendment is that Dutch nationals may now vote in European Parliamentary elections regardless of their place of residence.[374] However, to the difference of the French overseas territories, no voting takes place in the Dutch OCTs. Dutch OCT nationals who wish to vote are subject to the procedure for Dutch nationals voting from abroad which was already in place. Accordingly, they have to register first and then vote per letter or via proxy or go to the Netherlands if they want to vote in person.[375] This is different only in the BES islands, because they are, from the point of view of Dutch constitutional law, part of mainland Netherlands (see the discussion under II.A.1., *supra*). Accordingly, European Parliamentary elections are organised there as in the rest of the Netherlands, which means that voting takes place in polling stations in the Islands.[376]

The Dutch OCTs do not form a separate electoral constituency with separate candidate lists. Consequently, unlike French OCT nationals, Dutch OCT nationals are not guaranteed a fixed number of representatives in the European Parliament. In fact, given the small number of inhabitants in the Dutch OCTs, only a very high turnout of voters,

---

371 See the discussion in Chapter 2, under II.A.3, *supra*.

372 Wet van 30 oktober 2008 tot wijziging van de Kieswet in verband met het verlenen van het kiesrecht voor de verkiezing van de leden van het Europees Parlement aan alle Nederlanders die in de Nederlandse Antillen en Aruba woonachtig zijn, [2008] *Stb*., 475.

373 My own translation as far as Y.3.a. is concerned. Translation of Y.3.b., which was not modified in 2008, taken over from ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 15.

374 The possibility to stand as a candidate for European Parliamentary elections existed already before 2008.

375 Registration is possible in Aruba, Curaçao or Sint Maarten or directly with the *burgemeester en wethouders* ("mayor and municipal executive") of The Hague (Articles D.3 and Y.5a of the *Kieswet*).

376 See the amendments of the *Kieswet* by Wet van 17 mei 2010 tot wijziging van de Kieswet in verband met de nieuwe staatsrechtelijke positie van Bonaire, Sint Eustatius en Saba als openbaar lichaam binnen Nederland, [2010] *Stb.* 347.

who would moreover all vote for the same political party, would guarantee them one of the currently 25 seats for the Netherlands in the European Parliament.[377] It seems very unlikely that this situation will ever occur, given the lack of interest for European affairs in the OCTs,[378] which is perfectly illustrated by the low turnout in the Dutch OCTs in the 2009 elections for the European Parliament.[379] All the same, this does not take away the fact that the votes cast in the OCTs can have a determinate influence on the candidates eventually elected, now that voting is done on the basis of one list of candidates for Netherlands MEP positions.

The bottom-line is that, in line with my findings above, Member States like the Netherlands are competent to determine the scope and definition of the persons entitled to vote and to stand for elections to the European Parliament, on condition that this competence is exercised in compliance with Union law. In particular, Member States must respect the "general principles of Union law", such as the principle of equal treatment, as is neatly illustrated by the *Eman and Sevinger* case, and fundamental rights.[380] To illustrate the last point: one could wonder whether the *Kieswet*, in the version contested in *Eman and Sevinger*, which excluded certain categories of Dutch nationals from participating in European Parliamentary elections on the basis of their residence, was compatible with fundamental rights. The ECJ in *Eman and Sevinger* concluded that it was. It pointed out, under reference to a recent case of the ECtHR,[381] that a criterion of residence in relation to the right to vote was not contrary to the ECHR.[382] However, as was remarked by AG Tizzano,[383] the ECtHR had explained that residence may be a legitimate criterion, *because* it allows to grant the right to vote only to "those with sufficiently continuous or close links to […] the country concerned", *i.e.* those "directly affected by the acts of the political bodies" to be elected. Accordingly, the exclusion of OCT nationals would be in accordance with this case law if Dutch OCT nationals were not directly affected by the measures adopted by the European Parliament, to the difference of Dutch nationals resident in Europe. The ECJ was of the opinion that this was the case.[384]

---

377 Memorie van toelichting - Wijziging van de Kieswet in verband met het verlenen van het kiesrecht voor de verkiezing van de leden van het Europees Parlement aan alle Nederlanders die in de Nederlandse Antillen en Aruba woonachtig zijn, *Tweede Kamer*, 2007-2008, 31 392, nr. 3, 4 (estimating the turnout needed at 85% of the persons entitled to vote).

378 On the ambivalent attitude of OCT inhabitants towards the EU, see Muller, "Europe as a Pacific Power", in D. Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (Alphen aan den Rijn, Kluwer Law International, 2011), 341-361; Muller, "Problems of European Union Citizenship Rights at the Periphery" (1999) *Australian Journal of Politics and History*, 48; Muller, "European Union Citizenship Rights Divisible and Indivisible: The dissonance between nationality laws and regional identity" (1998) *Current Politics and Economics of Europe,* 4.

379 According to the figures available form the *Kiesraad* ("Election Council"), of the circa 210.000 persons entitled to vote, only 20.944 validly registered. See "Uitslag van de verkiezing van de leden van het Europees Parlement van 4 juni 2009. Deel 1. Kerngegevens", *available at* http://www.kiesraad.nl/nl/Overige_Content/Bestanden/pdf_thema/Kerngegevens_2009.pdf.

380 Fundamental rights are general principles of Union law, protected by the Union Courts. See already *e.g.* ECJ, Case 29/69 *Stauder* [1969] E.C.R. 419, para. 7.

381 ECtHR, Judgment of 19 October 2004 in Case No. 17707/02, *Melnychenko v. Ukraine*, para. 56.

382 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 54.

383 Opinion of AG Tizzano in Joined Cases C-145/04 and C-300/04 *Spain v United Kingdom; Eman and Sevinger* [2006] E.C.R. I-7917, paras 156 *et seq*.

384 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 48. The ECJ, referring to *Matthews* (ECtHR, Judgment of 18 February 1999 in Case No. 24833/94, *Matthews v. United Kingdom*), pointed out that it was not sufficient in this context that Union measures have an indirect

This point of view can however be questioned on good grounds (see the discussion under III.C.1.c., *infra*).

b) Phase 2: enlarging the personal scope

It was explained above that the scope of the election procedure to the European Parliament organised in each Member State is largely determined by national law, which has to be in accordance with (the general principles of) Union law. Moreover, and this is what I called higher the "second phase", it has to be in accordance with Article 22(2) TFEU. That Article, and Directive 93/109[385] adopted on the basis thereof, oblige the Member States to enlarge the scope of the election procedure, as determined in accordance with the provisions of "phase 1",[386] so as to include "every citizen of the Union residing in that Member State, but who is not a national of that Member State".[387] These Union citizens "shall have the right to vote and to stand as a candidate at elections to the European Parliament in that Member State, under the same conditions as nationals of that State".[388]

This is, of course, a significant enlargement of the group of persons entitled to participate in European Parliamentary elections. At the same time it should be stressed that Article 22(2) TFEU does not confer rights on *every* Union citizen, unlike for example Article 21 TFEU. First of all, it cannot be invoked by citizens who reside in a Member State of which they are a national. As AG Tizzano remarked in *Eman and Sevinger*:

> "In the present case, however, those claiming voting rights are Netherlands citizens who reside in the Kingdom of the Netherlands (or, rather, in one of the territorial divisions of that Kingdom), that is to say persons who *reside in the State of which they are citizens*. Those people therefore have no right to invoke [Article 22(2) TFEU]..." [389]

Secondly, it would seem to be the case that Article 22(2) TFEU cannot be invoked by Union citizens who are resident in a third country, *i.e.* not in a Member State of which they are a national nor in any other Member State. For example, under the *Kieswet*, Dutch nationals have the right to vote and stand as a candidate in elections to the European Parliament even when resident in a third country. It is quite clear that the Dutch legislator

---

impact in the OCTs, and that it is necessary for such measures affect the population there in the same way as measures adopted by the local legislative assembly.

385 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] O.J. L329/34.

386 It must be remarked in this regard that Article 22(2) TFEU explicitly states that it is "without prejudice to Article 223(1) and to the provisions adopted for its implementation", confirming that it produces its effects only in a "second phase".

387 See, on the implementation in the different Member States during the 2009 elections, Commission Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC), COM(2010) 605/2.

388 See further Article 3 of Directive 93/109, which states that any person who, on the reference date: (a) is a Union citizen and (b) is not a national of the Member State of residence, but satisfies the same conditions in respect of the right to vote and to stand as a candidate as that State imposes by law on its own nationals, shall have the right to vote and to stand as a candidate in elections to the European Parliament.

389 Opinion of AG Tizzano in Joined Cases C-145/04 and C-300/04 *Spain v United Kingdom; Eman and Sevinger* [2006] E.C.R. I-7917, para. 143.

cannot be forced to extend the same right to other Union citizens resident in a third country. The Netherlands electoral law quite rightly therefore does not extend this right to Union citizens of other Member States resident in third countries.[390]

The difficulty with regard to the OCTS is that it is not immediately clear whether they should be considered in this context as Member States, meaning that Article 22(2) TFEU applies, or as third countries, meaning that Article 22(2) TFEU is inapplicable to them. Obviously this issue is only relevant where nationals of the associated Member State resident in the OCTs enjoy the right to participate in European Parliamentary elections. Indeed, where Member States exclude nationals resident in the OCTs from the franchise of European Parliamentary elections, the status of OCTs for the purposes of Article 22 TFEU is of purely theoretical interest. In such a case, even if Article 22(2) TFEU applied, it would not have any effect with regard to Union citizens from other Member States resident in the OCTs in question. They would in any event not be entitled to participate in elections to the European Parliament.[391] Such logically follows from the principle of equal treatment, of which Article 22(2) TFEU is a particular expression.

Higher I explained that, at present, two Member States confer the right to participate in European Parliamentary elections on their nationals resident in the OCTs which are part of their territory, namely France and the Netherlands. For this reason, the question regarding the status of OCTs for the purposes of Article 22(2) TFEU is not of a purely theoretical interest. If Article 22(2) TFEU applies to the OCTs, then it requires that non-French citizens of the Union residing in one of the French OCTs get the right to vote and stand in elections to the European Parliament under the same conditions as French citizens resident in the OCTs. Likewise, non-Dutch citizens of the Union residing in one of the Dutch OCTs should in that case be entitled to vote and stand in elections to the European Parliament under the same conditions as Dutch citizens resident in the OCTs.

The question as to the applicability of Article 22(2) TFEU can, again, be answered in two ways. Under the traditional approach outlined above it has to be answered in the negative, since Article 22(2) TFEU is, in accordance with the *Leplat* case law, not among the provisions applicable to the OCTs.[392] Accordingly, a Union citizen resident in an OCT cannot be considered to be "residing in a *Member State* of which he is not a national" under Article 22(2) TFEU. It follows that Member States like France or the Netherlands are not obliged under Union law to extend the right to participate in elections to the European Parliament to nationals from other Member States residing in the OCTs, even though they are in any event allowed to do so.

---

390 Articles Y.3 (right to vote) and Y.4 (right to stand as a candidate) only cover citizens from other Member States who are actually resident in the Netherlands.

391 The example of the UK illustrates this point. Since British nationals resident in the British overseas may generally speaking not vote for European Parliamentary elections, the same is true for other Union citizens resident in the British OCTs (see the European Parliamentary Elections Act 2002 (c.24), Article 8(5), referring to the European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations). By contrast, Union citizens in Gibraltar may participate in European Parliamentary elections, just as British nationals (and QCCs) resident there: see s 16(1) of the European Parliament (Representation) Act 2003.

392 See Kochenov, "The Puzzle of Citizenship and Territory in the EU: On European Rights Overseas" (2010) 17 *MJ,* 249.

The Netherlands electoral law is fully in line with this first view. Article Y3.b. provides that the Members of the European Parliament are to be elected by[393]:

> "persons who are not Netherlands nationals and are nationals of other Member States of the European Union, provided that they:
>
> 1°. are actually resident in the European part of the Netherlands on the date on which candidates are nominated,
>
> 2°. have attained the age of 18 on the date of the election, and
>
> 3°. have not been deprived of their right to vote in the Netherlands or in the Member State of which they are nationals."

Accordingly, Union citizens from other Member States can only vote in European Parliamentary elections if they are actually resident in the Netherlands, *i.e.* the European territory of the Kingdom of the Netherlands. They do not have this right if they are actually resident in one of the Dutch OCTs, unlike Dutch citizens resident in one of the Dutch OCTs, who do enjoy this right since the 2008 amendments (see the discussion under III.C.1.a., *supra*). In fact, the 2008 amendments did not change anything with regard to the voting rights of Union citizens from other Member States resident in the OCTs. This is not wholly surprising. After all, the 2008 amendments were introduced in order to remedy the infringement of Union law exposed in *Eman and Sevinger* and, as I remarked higher, that case was only concerned with the voting rights of different categories of Dutch nationals and not with alleged violations of Article 22(2) TFEU. Moreover, it must be remarked that the solution chosen was to extend the pre-existing arrangements for voting in third countries to Dutch nationals resident in the OCTs. These arrangements have never been applicable to Union citizens from other Member States. Apparently, the Netherlands legislator did not feel compelled by Article 22(2) TFEU to extend the newly granted voting rights for Dutch nationals resident in the Dutch OCTs to other citizens of the Union resident there. It was most likely of the view that Article 22(2) TFEU simply did not apply *ratione loci* to the OCTs, in line with the *Leplat* case law, although any discussion of this issue in the preparatory acts to the 2008 amending legislation is lacking. This is again confirmed by the recent replacement of the expression "the Netherlands" by "the European part of the Netherlands" in Article Y.3, sub 1° of the Netherlands electoral law.[394] Without this change, Union citizens from other Member States resident in the BES Islands would now also have the right to vote in European Parliamentary elections, since the BES Islands are now part of the territory of the Netherlands. Accordingly, the Netherlands legislator continues to exclude Union citizens resident in the Dutch OCTs from the right to vote in European Parliamentary elections. The preparatory documents to the recent amendment explain in regard that Article 22(2) TFEU does not entail any obligations with regard to non-Dutch citizens of the Union resident in the OCTs.[395]

A second possible answer to the question asked above would be that Article 22(2) TFEU *is* applicable to the OCTs. A number of arguments can be adduced in support of this view. As a preliminary observation one could point out that it has never been confirmed in the

---

393 Translation of Article Y.3.b. in most part taken over from ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 15, with the exception of the recent amendments explained below (my own translation).

394 Wet van 17 mei 2010 tot wijziging van de Kieswet in verband met de nieuwe staatsrechtelijke positie van Bonaire, Sint Eustatius en Saba als openbaar lichaam binnen Nederland, [2010] *Stb.* 347, Article H.

395 Memorie van toelichting bij Wijziging van de Kieswet in verband met de nieuwe staatsrechtelijke positie van Bonaire, Sint Eustatius en Saba als openbaar lichaam binnen Nederland, *Tweede Kamer*, 2008-2009, 31 956, nr. 3, at 7.5.

case law of the Union Courts that Article 22(2) TFEU is not applicable to the OCTS. True, the *Leplat* case law was recently confirmed in *Eman and Sevinger,* a case concerning precisely the right of OCT nationals to participate in elections to the European Parliament. However, in that case Article 22(2) TFEU was not applicable.[396] The ECJ only confirmed *Leplat* with regard to Articles 189 and 190 TEC. Those articles, however, concern the "first phase" in the determination of the scope of Article 22(2) TFEU. One could go further, and argue that the *Leplat* reasoning does *not* hold good with regard to Article 22(2) TFEU. The reason is that, as explained at length above, the territorial scope of Article 22(2) TFEU is determined essentially by national law. Therefore, the expression "residing in a *Member State*..." should be interpreted with reference to national law, and not with regard to Union law. This seems to be confirmed by Directive 93/109.[397] That directive specifies that Union citizens, in order to be entitled to vote in their Member State of residence, have to reside in the "electoral territory" of that Member State (Article 9(2)a)). The "electoral territory" is defined as "the territory of a Member State in which, in accordance with the 1976 Act and, within that framework, in accordance with the electoral law of that Member State, members of the European Parliament are elected by the people of that Member State" (Article 2(2)). As pointed out above, the 1976 Act does not in fact define its territorial scope of application with any specificity, leaving this largely to the Member States. It follows that the "electoral territory" must be defined in accordance with the electoral law of the Member States.

In the case of France, the "electoral territory" indubitably includes the French OCTs (see under III.C.1.a., *supra*). Following the foregoing reasoning, this means that Article 22(2) TFEU and Directive 93/109 are applicable to Union citizens resident in the French OCTs. The French legislator apparently adheres to this view. In order to implement Directive 93/109/EC, the French law of 1977 on the elections to the European Parliament[398] was changed significantly by a law of 1994.[399] The most important provision of the latter law is without any doubt Article 1, which provides that nationals from other Member States residing on the French territory can vote in elections to the European Parliament under the same conditions as French citizens. Similarly, in its Article 3 the law provides that nationals from other Member States resident in France can stand as a candidate under the same conditions as French citizens. "Resident in France/residing on the French territory" in these provisions has to be understood as including the French OCTS because of the constitutional principle of the indivisibility of the Republic. This is moreover explicitly confirmed by Article 9 of the 1994 law, which states that its provisions are applicable to the French OCTs.

In the case of the Netherlands, the case is less clear-cut because it is not immediately clear whether the Dutch OCTs form part of the "electoral territory". In this regard, a distinction must be made between the BES islands, on the one hand, and the other Dutch OCTs, namely Aruba, Curaçao and Sint Maarten, on the other hand. As I explained higher, no voting for European Parliamentary elections takes place in the second group of OCTs and

396 See the discussion, *supra*.

397 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] O.J. L329/34.

398 Loi n°77-729 du 7 juillet 1977 relative à l'élection des représentants au Parlement européen.

399 Loi n° 94-104 du 5 février 1994 relative à l'exercice par les citoyens de l'Union européenne résidant en France du droit de vote et d'éligibilité aux élections au Parlement européen [1994] JORF, 2154.

Dutch nationals resident there who wish to cast their vote must register with the authorities from mainland Netherlands and cast their vote in the Netherlands, either by physically going to the Netherlands (in person or via proxy) or by having their ballot sent to the Netherlands. Consequently, it is arguable that these OCTs are not part of the territory in which "members of the European Parliament are elected by the people of that Member State". Not unimportant in this regard is that the new voting arrangements are laid down in an ordinary law (*wet*), enacted by the Netherlands, rather than in a *rijkswet*, enacted by the Kingdom of the Netherlands.[400] This would seem to confirm that these arrangements concern the European territory of the Netherlands only. Moreover, the Kingdom of the Netherlands does not have a constitutional principle of indivisibility. This is clearly illustrated by the fact that Dutch nationals resident in the second group of OCTs cannot participate in elections to the Lower House of the Netherlands Parliament.[401] These arguments do not hold good, however, for the BES islands. In these islands, voting for the European Parliament is organised like in the rest of the Netherlands and, hence, they should be considered part of the territory in which "members of the European Parliament are elected". Moreover, they are indisputably a full part of the territory of the Netherlands, as is illustrated by the fact that Dutch citizens resident in the BES Islands have full voting rights in elections to the Netherlands Parliament. In my view, the reference to national law for the definition of the electoral territory can in the case of the Netherlands only lead to one conclusion, namely that the BES Islands should be considered part of that territory.

Another strong argument for taking the view that the territorial scope of Article 22(2) TFEU includes the territory of the OCTs is that such is fully in line with the aim pursued by that Treaty provision, namely to eliminate discrimination between nationals and non-nationals in elections to the European Parliament. Indeed, taking this view leads to the conclusion that if, for instance, French citizens can vote in the French OCTs, other Union citizens should also be allowed to do so, under the same conditions. At the end of the day Union citizenship is intended to enable Union citizens to integrate better in the host Member State.[402] This aim could not be achieved if they were precluded from participating in European elections under the same conditions as nationals of the host Member State. Against this second argument, it could be argued that, since only very limited parts of Union law are applicable to the OCTs, voting rights for the European Parliament do not have a large impact on the possibilities for integration in the OCTs. This is precisely one of the reasons why Member States may exclude nationals resident in the OCTs from the franchise of elections to the European Parliament. Yet, as I will argue

---

400 This is a contentious issue that has given rise to a heated debate in the Netherlands parliament, in particular after a notable Dutch constitutional scholar defended the view that the amendments adopted by ordinary law were unconstitutional. See Hoogers, "Waartoe is de Nederlandse wetgever bevoegd? De wijziging van de Kieswet in verband met de zaak Eman-Sevinger" (2008) 83 *N.J.b.*, 1934.

401 See Article B1 of the Netherlands electoral law, which is set out *supra*. This exclusion was unsuccessfully challenged by Mr. Eman and Mr. Sevinger before the Netherlands Council of State and the ECtHR. See the discussion in Besselink, "Case C-145/04, *Spain v United Kingdom*, judgment of the Grand Chamber of 12 September 2006; Case C-300/04, *Eman and Sevinger*, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 September 2007, Applications Nos. 17173/07 and 17180/07, *Oslin Benito Sevinger and Michiel Godfried Eman* v. *the Netherlands* (*Sevinger and Eman*)"" (2008) 45 *CML Rev.*, 797 *et seq.*

402 See the preamble to Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] O.J. L329/34.

below,[403] the influence of Union law on the OCTs and, hence, the role played by the European Parliament with regard to the situation of the OCTs is increasing and can be expected to further increase. Besides, the fact that Member States like the Netherlands and France have accorded their OCT nationals the right to vote in European Parliamentary elections, implies that the European Parliament does indeed have a real influence on their position. Accordingly, the exclusion of other Union citizens from this right does, arguably, hamper their integration in the OCT of their residence to some extent. On this basis too it could be argued that the exclusion of non-Dutch citizens of the Union resident in the BES Islands from the right to vote in elections to the European Parliament is not in accordance with Article 22(2) TFEU.

Of course, one could point out that even if Article 22(2) TFEU is held to apply to the OCTs, certain forms of discriminatory treatment of Union citizens would remain in place. First of all, Union citizens resident in the British or Danish OCTs would not be entitled to participate in European Parliamentary elections, in contrast to Union citizens residing in the Dutch or French OCTs.[404] However, this differential treatment results purely from different choices made by the British and Danish legislator regarding their respective OCTs, choices which Union law currently accommodates.[405] It does not constitute a form of discrimination based on nationality, because in all OCTs all Union citizens are given the same treatment: they can either vote or they cannot, irrespective of their nationality. This contrasts sharply with the situation set out above in which only Dutch citizens can vote in the elections to the European Parliament organised in the Dutch OCTs and not other Union citizens residing there. Another form of discriminatory treatment which would continue to exist relates to the possibilities for participating in European Parliamentary elections for Member State nationals resident in third countries. As was explained above, a Member State may choose to grant these rights to its own nationals, but is not obliged under Article 22(2) TFEU to extend it to nationals of other Member States. However, with regard to third countries the aim to allow integration in the host Member State obviously does not apply. Furthermore, as was remarked by the Commission in *Eman and Sevinger*, there is a particularly strong reason to apply the principle of non-discrimination to citizens resident in the OCTs, given the "particular connection between the OCTs and the [Union]".[406] In conclusion, the fact that even if Article 22(2) TFEU is applied to the OCTs certain forms of discrimination between Union citizens will continue to exist, is not such as to call into question the second view set out above.

---

403 See under III.C.1.c., *infra*.

404 See the observations of the appellants in the main proceedings in ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 33 (pointing out that in the then applicable legal framework the right to participate in European Parliamentary elections for Dutch Antilleans differed according to whether they lived in the French part of Saint-Martin or the Dutch part (*Sint Maarten*). That example is not completely a case in point, as Saint-Martin is an outermost region and not an OCT.

405 As was explicitly acknowledged by the ECJ in ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, para. 50. According to settled case law, the prohibition on discrimination is not concerned with any disparities in treatment which may result, between the Member States, from divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it (see, *e.g.*, ECJ, Case C-177/94 *Perfilli* [1996] E.C.R. I-161, para. 17; ECJ, Case C-403/03 *Schempp* [2005] E.C.R. I-6421, para. 34; ECJ, Case C-428/07 *Horvath* [2009] E.C.R. I-06355, para. 55.

406 ECJ, *Eman and Sevinger* [2006] E.C.R. I-8055, para. 39.

c) Towards more inclusion of OCT nationals?

The foregoing makes clear that, in the present state of Union law, the extent to which OCT nationals enjoy the right to participate in elections to the European Parliament to a very large degree depends on choices made by the Member States. Member States seem free to decide whether they allow their nationals resident in the OCTs to participate in these elections and, if so, to decide whether to extend this entitlement to nationals from other Member States resident in their OCTs or not. Admittedly, this choice is limited by certain limitations deriving from Union law, but these limitations do not really "bite" in the sense that they would oblige Member States to extend voting rights to OCT nationals. It is universally accepted that the four Member States possessing OCTs can legitimately exclude Union citizens resident in the OCTs from the right to participate in European Parliamentary elections. Two of them, namely the UK en Denmark continue to do so. Moreover, there is a widespread view that Article 22(2) TFEU does not apply to the OCTs and that, consequently, Member States may reserve the right to participate in European Parliamentary elections to their own nationals resident in the OCTs, to the exclusion of Union citizens from other Member States.

Yet there are good arguments to question the tenability of the conclusions reached in the previous paragraph. First of all, the possibility to exclude OCT nationals from the franchise of elections to the European Parliament is in large part based on the assumption that Union law only very partially applies to the OCTs and that the European Parliament therefore has only a very limited influence on the lives of OCT inhabitants. This brought the ECJ in *Eman and Sevinger* to conclude that the European Parliament cannot be regarded as a "legislature" within the meaning of Article 3 of Protocol 1 to the ECHR in relation to the OCTs.[407] The ECJ observed in this regard that only limited provisions of Union law directly apply to the OCTs and that any indirect impact of Union law, for instance through voluntary adoption by the OCT authorities, is not sufficient for them to be regarded as affecting the population of the OCTs in the same way as measures emanating from a local legislative assembly.[408] Accordingly, the exclusion of nationals resident in the OCTs from the right to vote in elections to the European Parliament does not, according to the ECJ, pose problems under the ECHR.

Yet, it cannot be ignored that the European Parliament does play a role in adopting the laws applicable to the OCTs. Very significant in this connection is that, since the entry into force of the Lisbon Treaty, Article 203 TFEU, which sets out the decision-making procedure for adopting OCT Decisions, provides for the consultation of the European Parliament.[409] Besides, it must be acknowledged that there is a trend towards wider applicability of the Union *acquis* in the OCTs and this trend will most likely be enforced under the new OCT decision, as is clear from recent Commission documents.[410] It is clear that many of the rules falling under that *acquis* are adopted by the European Parliament, which is a full-blown co-legislator under the "ordinary legislative procedure".

---

407 Article 3 of Protocol No 1 provides: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

408 ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055, paras 48-49.

409 A point also made by Omarjee, "Les statuts constitutionnels des ressortissants des outre-mers", in Tesoka and Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité* (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 66.

410 See n. 187 and 188 and the accompanying text.

On the basis of these observations, it can be questioned whether the assumption of only a very limited and indirect influence of the European Parliament on the OCTs is still valid. Once this assumption falls through, significant doubts are shed on the tenability of excluding OCT nationals from the franchise of European Parliamentary elections. Not without significance in this regard is the recent choice of the Netherlands to extend voting rights to Dutch nationals resident in the OCTs. In the preparatory act to the 2008 amendment the Dutch legislator noted that it could remedy the discrimination exposed also by limiting voting rights, for instance to those nationals resident in the Netherlands. It chose, however, conversely, to extend voting rights to all its nationals, regardless of their place of residence, thereby stating that such extension does justice to the fact that most inhabitants of the Dutch OCTs are "not just Dutch citizens, but also citizens of the Union".[411] As a result, Member State nationals resident in the OCTs are now entitled to vote in elections to the European Parliament in two of the four Member States possessing OCTs.

Second, I have argued higher that there are good reasons for considering that Article 22(2) TFEU does apply to the OCTs *ratione loci*. Accordingly if a Member State decides to grant its nationals resident in the OCTs the right to participate in elections to the European Parliament – and there are compelling arguments in favour of doing so, as I just explained – then it should also extend this right to all other Union citizens there resident. Put differently, the OCTs by that act become part of the "electoral territory" in which the non-discrimination principle of Article 22(2) TFEU applies. Only under this reading can the provision achieve its purpose, namely facilitating integration of Union citizens in the host Member State. In this connection too, the growing influence of the European Parliament on the lives of Union citizens resident in the OCTs (also those who are not nationals of the associated Member State) makes it ever more difficult to justify their exclusion from the right to participate in European Parliamentary elections. Viewed in this light, the choice of the Netherlands legislator not to extend the voting rights recently conferred on Dutch nationals resident in the OCTs to nationals from other Member States is regrettable. It became even more regrettable after the recent change of status of the BES Islands to that of a public body. Since Dutch law applies in full to the BES Islands, with some exceptions, Union law applies – through the intermediary of Dutch law – to a much wider extent than in other OCTs. In my view, it is clear that the arrangements in place in the Dutch OCTs surrounding the right to vote in elections to the European Parliament are not in accordance with Article 22(2) TFEU.[412]

My conclusion is that the right to participate in European Parliamentary elections should ideally be extended to the fullest extent possible to Union citizens resident in the OCTs. In my view such is necessary in order to attain the full potential of the provisions on Union citizenship. The right to participate in European Parliamentary elections is beyond dispute

411 Memorie van toelichting - Wijziging van de Kieswet in verband met het verlenen van het kiesrecht voor de verkiezing van de leden van het Europees Parlement aan alle Nederlanders die in de Nederlandse Antillen en Aruba woonachtig zijn, *Tweede Kamer*, 2007-2008, 31 392, nr. 3).

412 This opinion is apparently shared by Mito Croes, former Minister Plenipotentiary of Aruba and noted scholar in the field of Dutch constitutional law in relation to the overseas territories (see, in particular, Croes, *De herdefiniëring van het Koninkrijk* (Nijmegen, Wolf Legal Publishers, 2006), 513 pp). See "CDA wil stemmen van Belgen op Antillen en Aruba" (NRC Handelsblad, 2 April 2009), *available at* http://www.nrc.nl/europa/article2201568.ece/CDA_wil_stemmen_van_Belgen_op_Antillen_en_Aruba.

one of the core rights associated with Union citizenship and should be enjoyed by all Union citizens regardless of their place of residence. This is true even though this right is not expressly laid down in the Treaties[413] or the Charter.[414] Indeed, it can be inferred from these provisions and from the essential democratic principles on which the Union is based, that all Union citizens should enjoy this right.[415] The inherent link between the right to participate in European Parliamentary elections and Union citizenship is further exemplified by the new wording of Article 14(2) TEU, which no longer makes reference to "representatives of peoples of the States", but instead to "representatives of the Union's citizens".[416] Given the importance of enjoying the right, its exercise can only be made subject to conditions that are strictly necessary and duly justified. A condition of not being actually and ordinary resident in the OCTs can, for reasons explained higher, not be duly justified.

Accordingly I come to the conclusion that the correct reading of the citizenship provisions argues for a more inclusionary approach towards OCT nationals. It can only be hoped that in the near future, this may induce the Member States concerned to further extend electoral rights to Union citizens, both nationals and non-nationals, resident in the OCTs. The implementation of a new and closer association with the OCTs, currently envisaged by the Commission, might give them an impetus to do so.

2. Municipal elections

The above analysis focuses on Article 22(2) TFEU and the right of OCT nationals to participate in European Parliamentary elections. The next question is whether the same reasoning can be applied with regard to municipal elections, in relation to Article 22(1) TFEU. With regard to elections to the European Parliament, I observed that the conditions and procedure are mostly regulated by the Member States, which must respect (general principles of) Union law. It was also shown that Article 22(2) TFEU produces its effect essentially in a "second phase": it enlarges the scope of the European Parliamentary

413 As noted higher, Article 22(2) does not embody any right to vote or stand as a candidate in itself, but is rather a particular expression of the principle of non-discrimination in relation to these rights.

414 Article 39(1) of the Charter states "Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State". In my view this has to be interpreted in very much the same way as Article 22(2) TFEU.

415 Opinion of AG Tizzano in Joined Cases C-145/04 and C-300/04 *Spain v United Kingdom; Eman and Sevinger* [2006] E.C.R. I-7917, para. 69. This opinion is shared by legal scholars: see, *e.g.*, Mehdi, "La Citoyenneté européenne", in Tesoka and Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité* (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 38-40. See also the discussion in Nic Shuibhne, "The Resilience of EU Market Citizenship " (2010) 47 *CML Rev.*, 1621-1622.

416 This cannot in my view be interpreted as meaning that only Union citizens may participate in elections to the European Parliament, but it does confirm that in principle all Union citizens should be entitled to do so. See in this connection Declaration (no 64), annexed to the Treaties, by the United Kingdom of Great Britain and Northern Ireland on the franchise for elections to the European Parliament, [2010] O.J. C83/358, in which the UK notes that Article 14 TFEU and other provisions of the Treaties are not intended to change the basis for the franchise for elections to the European Parliament. Obviously, such a declaration has a limited legal value (see the discussion in Chapter 2 under III.A.3., *supra*). See also the discussion in Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in Craig and De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011), 600-603.

elections in each Member State, so as to include, under application of the same procedure and conditions, all Union citizens who reside in that Member State but who are not a national of that Member State.

Prima facie at least, it would seem that much of that reasoning holds good with regard to Article 22(1) TFEU. The idea behind Article 22(1) TFEU is the same as for Article 22(2) TFEU: it is an expression of the principle of non-discrimination on grounds of nationality with regard to the exercise of the right to vote and stand as a candidate in municipal elections.[417] In other words: it takes the conditions and procedures surrounding these elections as a given, and then comes "in second order", and enlarges the scope of beneficiaries so as to include, under certain conditions, citizens from other Member States. It follows that, in order to determine the rights of OCT nationals under Article 22(1) TFEU, one must adopt an analysis consisting of two phases, just like under Article 22(2) TFEU. However, for reasons discussed below, the reasoning cannot be completely analogous.

a) Phase 1: national and EU provisions

The procedure and conditions for municipal elections are determined in each Member State by national law. To the difference of elections to the European Parliament, there are no Treaty provisions which directly regulate aspects of municipal elections. Of course, this does not necessarily mean that Union law in no way influences the matter. Quite to the contrary, one could assume that general principles of Union law will have to be respected by national legislators when regulating municipal elections, just like it is the case with regard to elections to the European Parliament (see *supra*, on *Eman and Sevinger*).

However, there might be one relevant difference which casts doubts on that assumption. It is certainly worth noting that in *Eman and Sevinger* the ECJ seems to have started from an implicit assumption that Union law was applicable to the situation at hand. It was not completely obvious, however, that the situation fell within the scope of Union law. One could have argued that the situation in that case, an alleged discrimination by the Dutch government between two groups of Dutch nationals which did not necessarily have any link with other Member States, constituted a purely internal situation. Contrarily to certain other cases dealing with Union citizenship,[418] the ECJ did not devote any attention to this issue and did not explain why Union law was applicable to the circumstances of the case. The reason for this is probably that the judgment concerned elections to the European Parliament, a fact which in itself most probably provides a sufficient link with Union law.[419] However, if the "linking factor" with regard to elections to the European

---

417 See the preamble to Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] O.J. L368/38.

418 *E.g.* ECJ, Case C-224/98 *D'Hoop* [2002] E.C.R. I-6191; ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925; ECJ, Case C-406/04 *De Cuyper* [2006] E.C.R. I-6947. See the discussion in Van Nuffel and Cambien, "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren" (2009) 57 *SEW*, 144-154.

419 Shaw, "The Political Representation of Europe's Citizens" (2008) 4 *EuConst*, 184; Besselink, "Nederlands postkoloniaal kiesrecht: het Europees Parlement en de Tweede Kamer" (2007) *N.T.E.R.*, 68; Claes, "Zaak C-300/04, M.G. Eman en O.B. Sevinger t. College van burgemeester en wethouders

Parliament is to be found solely in the fact that it concerns elections to a *European* assembly, the analogy with municipal elections breaks down. As a result, the participation in municipal elections in a given Member State by nationals of that Member State probably constitutes, in the absence of any other link with Union law, a purely internal situation. It follows that the national legislator will probably not have to take general principles of Union law into account when laying down the conditions and procedures for such elections. For example, a Dutch law that would confer the right to vote in municipal elections in the Netherlands on all Dutch nationals temporarily resident in a non-member country, but not on Dutch nationals temporarily resident in one of the OCTs would probably not violate Union law.[420] Of course, all this does not detract from the fact that other, constitutional or international, general principles may well apply, restricting the legitimate choices of national legislator. I refer to my discussion of purely internal situations under Article 21 TFEU.[421]

Another relevant difference with elections to the European Parliament is that nationals of the associated Member State resident in the OCTs can normally participate in municipal elections there. They are, so to say, the natural "vestees" of that right.[422] Accordingly, the issue of whether an associated Member States should confer the right to participate in municipal elections on its nationals resident in the OCTs does simply not arise. Consequently, the "first stage" of the analysis takes much less importance than with regard to European Parliamentary elections.

b) Phase 2: enlarging the personal scope

The effect of Article 22(1) TFEU is very similar to that of Article 22(2) TFEU. It obliges the Member States to enlarge the scope of the election procedure for municipal elections, as determined in accordance with the provisions of "phase 1", so as to include "every citizen of the Union residing in that Member State, but who is not a national of that Member State". These citizens "shall have the right to vote and to stand as a candidate at municipal elections in that Member State, under the same conditions as nationals of that State". Member States achieve this by implementing Directive 94/80.[423]

Again, the question arises what consequences this has with regard to the rights of OCT nationals to participate in municipal elections. Just like for Article 22(2) TFEU, it must be remarked that Article 22(1) TFEU does not confer rights on *every* Union citizen. First of all, Union citizens resident in the Member State of which they are a national cannot invoke

---

van Den Haag en Zaak C-145/04 Koninkrijk Spanje t. Verenigd Koninkrijk van Groot-Brittanië en Noord-Ierland" (2007) *SEW*, 216.

420 I take this hypothetical example to make a parallel with the facts that gave rise to the *Eman and Sevinger* case. This parallel does not hold completely, since one can assume that Dutch nationals resident in the OCTs could obtain the right to vote in municipal elections in the OCTs and would be in a different position, therefore, than Dutch nationals resident in a third country. For this reason, I refer to temporary residence in order to make the hypothetical example about non-OCT Dutch nationals that have supposedly no right to vote in OCT municipal elections.

421 See under III.B.2.b.ii., *supra*.

422 Compare with Opinion of AG Tizzano in Joined Cases C-145/04 and C-300/04 *Spain v United Kingdom; Eman and Sevinger* [2006] E.C.R. I-7917, para. 71.

423 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] O.J. L368/38.

Article 22(1) TFEU. This is important, because it means that that article does not have the effect of changing the conclusion reached above that the participation of nationals of a given Member State in municipal elections in that Member State constitutes a "purely internal situation". Article 22(1) TFEU does not apply to this situation, and cannot therefore be seen as a "linking factor" that brings this situation within the scope of Union law. Secondly, Article 22(1) TFEU cannot be invoked by Union citizens who are not resident in any Member State. The position with regard to third countries is very clear. Article 1(2) of Directive 94/80 states that "nothing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside its territory".

However, the situation is less clear with regard to the OCTs. As remarked above, it is not clear from the outset whether OCTs should be considered to be covered by the expression "Member State" for the purposes of Article 22 TFEU or not. Again, two points of view are possible. A first, straightforward point of view is to point out that Article 22(1) TFEU is, when applying the *Leplat* case law, not among the provisions applicable to the OCTs.[424] It follows that a non-national citizen of the Union resident in an OCT cannot be considered to be "residing in a *Member State* of which he is not a national", and cannot therefore invoke the right under Union law to participate in the municipal elections in that OCT under the same conditions as nationals of the associated Member State. Of course, this does not preclude Member States from extending the right to participate in municipal elections in the OCTs to citizens from other Member States residing there. However, such extension then purely rests on a national decision and nationals from other Member States could not in that case invoke Union law in order to have it enforced.

The first view finds confirmation, as far as the UK is concerned, in Directive 94/80 itself. The Annex to the Directive, which defines the entities to which the Directive applies, lists the following entities for the UK:

> "counties in England; counties, county boroughs and communities in Wales: regions and Islands in Scotland; districts in England, Scotland and Northern Ireland; London boroughs; parishes in England; the City of London in relation to ward elections for common councilmen"

This clearly excludes municipal elections in the British OCTs. The Netherlands legislator also adheres to the first view, as was confirmed in connection with the recent amendments of the *Kieswet* in relation to the recent change of status of the BES-islands.[425] Before the changes, only Dutch nationals could vote in local council elections ("eilandsraadverkiezingen") in the Netherlands Antilles and Aruba. This remains the case in Aruba, Curaçao and Sint Maarten. In elections for the local councils ("eilandsraden"[426]) in the different BES Islands, by contrast, the Netherlands legislator has extended the right to vote to Union citizens after five years of residence in the BES islands. This obviously goes some way towards guaranteeing non-discrimination between Union citizens. At the same time, it is striking that Union citizens in the BES Islands are made subject to a five year residence condition, a condition which does not apply for Union citizens who want to

---

424 Kochenov, "The Puzzle of Citizenship and Territory in the EU: On European Rights Overseas" (2010) 17 *MJ,* 247.

425 See the discussion under II.A.1., *supra*.

426 *Eilandsraden* closely resemble *gemeenteraden* in the Netherlands. This is normal since the BES Islands now have the status of public body ("openbaar lichaam"), a status which is close to that of a Dutch municipality ("gemeente").

vote in local council elections in mainland Netherlands.[427] The Dutch legislator justifies this difference between voting rights for Union citizens in the Netherlands and in the BES Islands by stating that Article 22(1) TFEU and Directive 94/80 do not apply in the BES Islands, since they are OCTs for the purposes of Union law.[428]

A second point of view is that Article 22(1) TFEU is applicable to the OCTs. Largely the same arguments apply as the ones set out above. First, the *Leplat* reasoning seems not to hold good with regard to Article 22(1) TFEU. Just like in Article 22(2) TFEU, and for the same reasons as set out above, the expression "residing in a *Member State…*" should be interpreted with reference to national law. This is, arguably, illustrated by the fact that Directive 94/80, for the definition of "basic local government unit" refers to the concepts as defined in the internal laws of the Member States.[429] In some of the Member States, France in particular, this would seem to include the "basic local government units" in the OCTs. In relation to France, this term is to be understood as referring to "commune" and "arrondissement dans les villes déterminées par la législation interne, section de commune".[430] It is clear, moreover, that a substantial number of the French communes are in the French overseas territories.[431] As a consequence it would seem that Directive 94/80 applies to the French Overseas territories. In line with this expectation, the French law implementing Directive 94/80, which lays downs the conditions for the participation of Union citizens in French municipal elections, explicitly states that it applies to the French overseas territories.[432]

Second, taking the view that the territorial scope of Article 22(1) TFEU must be held to cover the OCTs is fully in line with the aim pursued by that article: to eliminate discrimination between nationals and non-nationals in municipal elections. The case for applying Article 22(1) TFEU to the OCTs is even stronger than the one for applying Article 22(2) TFEU. Indeed, in relation to European Parliamentary elections it could be argued that, in view of the limited influence of the European Parliament on the lives of OCT inhabitants, excluding OCT nationals from elections to the European Parliament does not lead to factual discrimination with a tangible impact. Above, I argued that there is some truth in this assumption, although I also argued that it is not tenable, certainly not in the long run given the increasing influence of the European Parliament vis-à-vis the OCTs

---

427 Compare Article B.3 and Article Y.a.14 of the Netherlands electoral law. The condition of five years residence applies for municipal elections only with regard to foreigners who are not Union citizens.

428 Memorie van toelichting bij Wijziging van de Kieswet in verband met de nieuwe staatsrechtelijke positie van Bonaire, Sint Eustatius en Saba als openbaar lichaam binnen Nederland, *Tweede Kamer*, 2008-2009, 31 956, nr. 3, at 7.2.

429 See Article 2(1)(a) of Directive 94/80 and the Annex to that directive. Article 2(1)(a) defines "basic local government unit" as "the administrative entities listed in the Annex which, in accordance with the laws of each Member State, contain bodies elected by direct universal suffrage and are empowered to administer, at the basic level of political and administrative organization, certain local affairs on their own responsibility".

430 See the Annex to Directive 94/80.

431 See the Code des collectivités d'outre-mer (COM), Articles. 97-5 *et seq*.

432 See Loi organique n°98-404 du 25 mai 1998 déterminant les conditions d'application de l'article 88-3 de la Constitution relatif à l'exercice par les citoyens de l'Union européenne résidant en France, autres que les ressortissants français, du droit de vote et d'éligibilité aux élections municipales, et portant transposition de la directive 94/80/CE du 19 décembre 1994. See further Article 88-3 of the French Constitution providing: "Sous réserve de réciprocité et selon les modalités prévues par le Traité sur l'Union européenne signé le 7 février 1992, le droit de vote et d'éligibilité aux élections municipales peut être accordé aux seuls citoyens de l'Union résidant en France". "Resident in France" is to be read as including the OCTs, for reasons explained above.

and their inhabitants. As for municipal elections, there can be no doubt that municipal councils have a real impact on the daily lives of OCT inhabitants. Hence, the exclusion of Union citizens from other Member States resident in the OCTs from the right to participate in municipal elections certainly leads to discrimination with a tangible impact which hampers their integration in the host society of the OCT.

3. Conclusion

Union citizens enjoy important electoral rights, namely the right to participate, under certain conditions, in European Parliamentary and municipal elections. Yet, in relation to OCT nationals the enjoyment of this right appears to be subject to two important limitations. First of all, the relevant Treaty provisions appear to leave it to the Member States to decide whether they grant these rights to Union citizens resident in the OCTs, as long as general principles of Union law are complied with. Accordingly, both the UK and Denmark continue to exclude OCT nationals from the right to participate in European Parliamentary elections. Second, there is a widely shared view that Member States may decide to grant these rights to their own OCT nationals only, to the exclusion of Union citizens from other Member States resident in the OCTs. Accordingly, even after the recent amendments, the Netherlands electoral law reserves the right to participate in European Parliamentary elections to Dutch OCT nationals. Similarly, only Dutch OCT nationals may participate in municipal elections in Aruba, Curaçao and Sint Maarten.

In my view, the time has come to reject these traditional views and adopt a more inclusionary approach towards OCT nationals. Given the tangible and increasing influence of the European Parliament on the lives of OCT nationals and the evolution towards greater application of Union law in the OCTs, it is no longer defensible to exclude OCT nationals from the right to participate in European Parliamentary elections. Moreover, there is no good justification for allowing Member States to reserve the enjoyment of electoral rights in the OCTs to their own nationals. Article 22(1) and (2) TFEU, which embody the principal of equal treatment, can only achieve their purpose if they are held to be applicable *ratione loci* to the OCTs. The application of Article 22 TFEU in the OCTs is necessary in order to realise the full potential of the provisions on Union citizenship and of the association with the OCTs. Higher I employed similar reasoning to conclude that Article 21 TFEU should be applicable, to a limited extent, to the OCTs. One can conclude that large similarities exist between Article 21 and 22 TFEU, even in spite of the apparent big differences between them. This conclusion is to be welcomed, because Article 22 TFEU is and should be seen as the corollary of the rights mentioned in Article 21 TFEU.[433]

IV CONCLUSION

[433] See the preamble to Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] O.J. L329/34 and the preamble to Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] O.J. L368/38.

Three important conclusions can be drawn from the foregoing analysis of the dynamics behind OCTs and the provisions on Union citizenship. First, those citizens resident in the OCTs who have the nationality of one of the Member States are full-blown Union citizens, unless that Member State submits a declaration providing differently. At present, all Danish, Dutch and French nationals and most British nationals living in the OCTs are Union citizens therefore. Hence, they fully enjoy all rights and are subject to all duties attached to that status. However, as far as the enjoyment of these rights is concerned, most OCT nationals find themselves in a somewhat peculiar situation. The reason is that it is traditionally accepted that only limited parts of the Treaties apply to the OCTs and that the Union citizenship provisions are not in principle among them. The consequence of this traditional view is that, while OCT nationals do enjoy citizenship rights, they cannot normally invoke them in the OCTs, because the latter are outside the geographical scope of the provisions embodying these rights. However, as I have argued above, there are strong arguments for doing away with the said traditional assumption and holding that the provisions on Union citizenship apply to the OCTs, at least partially. Such seems necessary to guarantee the full effectiveness of the provisions on Union citizenship, but also to protect and enhance the association between the Union and the OCTs (see also the third conclusion, below). On these grounds I have argued that the free movement provisions, in particular Article 21 TFEU, should guarantee at least a right to travel from the OCTs to the (European) territory of the Member States. On these grounds I have further argued that the Member States should extend the right to participate in European Parliamentary and municipal elections to the fullest extent possible to Union citizens resident in the OCTs, both nationals and non-nationals.

A second, and immediately related conclusion is that the provisions on Union citizenship have had, and will most likely continue to have, a profound and significant impact on the policies of the Member States with regard to their OCTs. This is clearly illustrated by the recent changes in the Netherlands electoral law, extending the right to vote in European Parliamentary elections to Dutch nationals resident in the Dutch OCTs. This extension was explicitly motivated with reference to an important ECJ judgment on Union citizenship and to the fact that OCT nationals are full-blown Union citizens. I refer to the detailed discussion above. Another example of a change in legislation that, arguably, has been prompted by the provisions on Union citizenship is the British Overseas Territories Act 2002. It was explained higher[434] that this act has the effect of extending British citizenship, and hence Union citizenship, to most British nationals who were formerly British Overseas Territories Citizens (BOTCs), and hence not Union citizens. It appears clearly from the preparatory acts and the debates before the Houses of Parliament[435] that the provisions on Union citizenship were one of the key elements that were taken into account when drafting the new Bill. On the one hand there was the insistence that the connection between Britain and BOTCs had to be strengthened and that BOTCs had to enjoy the same rights as British citizens. Among the rights most prominently mentioned in this regard was the right to free movement within the European territory, a right associated with the status of Union citizen. Interestingly, at one point in the debates before the House of Lords there was a proposed amendment phrased: "The rules governing Union citizenship and member states of the European [Union] shall not extend to British overseas

434 See under II.B.4.a.iv., *supra*.

435 See, for the House of Lords: Hansard, Vol 626, Col 26; Vol 626, Cols 1014-1037; Vol 626, Cols 1862-1895; Vol 627, Col 944; Vol 627, Cols 1299-1301; Vol 631, Cols 1319-1322. See, for the House of Commons, Hansard, Vol 375, Cols 477-546; Vol 380, Cols 270-283; Vol 380, Col 679.

territories citizens who claim British citizenship".[436] Admittedly, this was only a probing amendment, but the discussion of it made clear how important considerations flowing from Union citizenship were in bringing about the proposed changes. Baroness Amos, who had introduced the British Overseas Territories Bill,[437] stated that the amendment

> "would in effect deny to British Overseas Territories citizens the rights to freedom of movement in Europe to which they would be entitled as British citizens, and therefore take away an important advantage of British citizenship. By granting British citizenship to British Dependent Territories citizens we would in effect be lifting the limitations that that status currently carries with it, especially with regard to freedom of movement […]."[438]

Similarly, it was pointed out during the debates that it was important that citizens of the British Overseas territories were represented in the Union institutions, and that they should be entitled therefore to participate in European Parliamentary elections,[439] another right associated with the status of Union citizen. A last important right discussed was the right of equal treatment of Union citizens. Some MPs pointed out that it would be unfair if BOTCs were consistently treated less favourably than other Union citizens, for example with regard to entitlement to obtain grants for higher education in Britain. On the other hand, there were multiple references to the fact that other EU Member States did grant Union citizenship and the accompanying rights to their OCT nationals, and that there seemed to be little justification for denying these to British OCT nationals.[440] As such it results that the provisions on Union citizenship may have acted as an important stimulus in the 2002 changes in the British nationality legislation.

A last conclusion, which is again related to the previous one, is that the provisions on Union citizenship have a fundamental role to play in the functioning of the association of the Overseas Countries and Territories.[441] These provisions entitle OCT nationals to important rights which are apt to further the connection between them and the Union. Most importantly perhaps, they entitle OCT nationals to participate in elections to the European Parliament, a body with important decision-making powers in relation to them.[442] Other important rights in this regard are the right of free movement in the territory of the Member States (Article 21 TFEU), the right to protection by the diplomatic or consular authorities of any Member State in a third country (Article 23 TFEU)[443] and

---

436 House of Lords, (Hansard Vol 626, Cols 1866).

437 House of Lords, (Hansard Vol 626, Col 26).

438 House of Lords, (Hansard Vol 626, Cols 1871).

439 House of Commons (Hansard Vol. 375, Col. 532).

440 See, *e.g.*, the White Paper of the British Government of March 1999 entitled "Partnership for Progress and Prosperity: Britain and the Overseas Territories", Chapter Three "Citizenship", stating that: "Many people from the Overseas Territories have made it clear that they want British citizenship so that they can travel more freely. It is right that they should be able to do so. They should be able to enter Britain through our ports through the same channels as British citizens and other European Union (EU) nationals – who at present include inhabitants of French and Dutch territories, but not those of our own except Gibraltar and the Falkland Islands."

441 See Part Four of the TFEU.

442 In the discussion of the Overseas Territories Bill before the House of Lords, Lord Naseby remarked in this regard: "There is a particular problem with Europe. The territories have to have access to the debates in Europe on an elected basis rather than an executive basis. One has only to look at the equivalent of Hansard for the European Parliament to notice how often the interests of those parts of the world are debated. It is fundamental that they should have a voice." (House of Lords, Hansard, Vol. 626, Col. 1033).

443 This right is by its nature to be exercised in third countries and not in the Member States. Yet, by allowing OCT nationals to seek in third countries diplomatic protection from the authorities of

the right to petition the European Parliament and to apply to the Ombudsman (Article 24 TFEU). These provisions have the beneficial effect of obliging the Member States to change their policy with regard to the OCTs to a more "inclusive one", strengthening the ties with their distant overseas nationals and further integrating them in the European construction. As such, the provisions on Union citizenship make a significant contribution to the close association that exists between the Union and the OCTs and to some of its most important purposes, namely to "promote the economic and social development of the OCTs" and to "further the interests and prosperity of the inhabitants of the OCTs in order to lead them to the economic, social and cultural development to which they aspire".[444] This tendency towards more inclusion of OCT nationals and Union citizens resident in the OCTs can be expected to further increase in the light of the new partnership with the OCTs proposed by the Commission, a partnership characterised by increased reciprocity and greater applicability of the Union *acquis*.

another Member State than their associated Member State, it is apt to further the connections between them and the former Member State.

444 See Article 198 TFEU and the preamble to the OCT decision.

PART II

FREE MOVEMENT OF UNION CITIZENS

CHAPTER 4 APPLICABILITY OF THE PROVISIONS ON THE FREE MOVEMENT OF UNION CITIZENS

I INTRODUCTION

Part II focuses on the right to move and reside freely within the territory of the Member States, which is perhaps the most important right associated with Union citizenship. Secondary Union legislation – at present Directive 2004/38 – confers this right not only on Union citizens themselves, but also on their close family members, who may "accompany or join" the Union citizen in the Member States. This first chapter of Part II focuses on the scope of the provisions conferring free movement rights on Union citizens. More in particular, the question I will try to answer is what "triggers" the application of the free movement rights, and the rights concerning family reunification in particular. To this purpose, I will divide the chapter into two parts, which correspond to two main questions. In the first part (Title "II") I examine whether it is sufficient that a Union citizen moves to another Member State in order to rely on the free movement rights for himself and his family members or whether it is, in addition, required that his family members move between Member States in order to "activate" these rights. In the second part (Title "III"), I try to determine whether movement is required at all, *i.e.* whether and in what certain circumstances static Union citizens could also fall within the scope of the free movement provisions. This will entail an analysis of a related question, namely how much "movement" is required in order for a Union citizen to be able to rely on the free movement provisions, in particular against his home Member State.

Once the free movement provisions are applicable, a Union citizen has, under certain conditions, the right to be joined or accompanied by family members from other Member States or even third country. The legal position of these family members is situated on an intersection between the provisions on the free movement of Union citizens and the provisions on immigration. To the extent that their situation falls within the scope of the former, Union law applies to them. To the extent that they fall outside, their situation will be principally regulated by the immigration laws of the Member States concerned. Accordingly, it is clear that the determination of the scope of the free movement provisions has an impact for the immigration policies of the Member States. In this connection, I will try to determine how big this impact is and how much scope Union law leaves to the Member States to pursue an effective immigration policy.

II WHO NEEDS TO MOVE: THE CITIZEN OR THE FAMILY MEMBER?

The situation I am concerned with under this heading is that of a non-EU family member of a Union citizen claiming a right of residence in one of the Member States. Union free movement law does unquestionably confer residence rights on family members of Union citizens. The question I try to answer is under what circumstances,

these residence rights can be invoked. In other words: what conditions need to be fulfilled in order for a family member of a Union citizen to be able to rely on the rights conferred on him or her by Union free movement law? This issue has stirred up a lot of controversy, which can be explained by the fact that the determination of this issue has a direct impact on the scope of the competences of the Member States in the field of immigration. The case law of the ECJ has long been unclear on this issue and has further added to the existing confusion. It is only with the *Metock and Others* judgment of 25 July 2008 that the ECJ has finally restored clarity.

In the following I will first briefly discuss the cases preceding *Metock and Others* and consider the underlying reasons for the apparently diverging judgments (A). Next I will discus the *Metock and Others* judgment in some detail and consider its consequences for the scope of Union free movement law (B). This will allow me to formulate an answer to the fundamental question of whether Union law achieves a proper balance between, on the one hand, guaranteeing the *effet utile* of the free movement provisions and, on the other hand, safeguarding the interests of the Member States in pursuing effective immigration policies (C.).

A. Mixed signals in earlier case law

The main reason why the issue of the scope of residence rights enjoyed by non-EU family members of Union citizens is a contentious one is that the issue is situated at an "intersection" of competence fields which belong to different competence levels, namely the Union, on the one hand, and the Member States, on the other hand.[1]

The Union, on the one hand, is competent to regulate the free movement of persons within the territory of the Member States. This follows from the Treaty provisions on the free movement of Union citizens,[2] in conjunction with the instruments of secondary legislation adopted to give effect to these provisions.[3] As a corollary to the free movement rights of Union citizens, these instruments also provide for rights of their family members, including third country nationals, to move and reside with them.[4] The Member States, on the other hand, remain competent in respect of most aspects of immigration policy. Admittedly, since the entry into force of the Treaty of Amsterdam the Union has become competent to enact measures *inter alia* with

---

1 As was very well explained by AG Geelhoed in his Opinions in two earlier cases: Opinion of AG Geelhoed in Case C-109/01 *Akrich* [2003] E.C.R. I-9607, paras 37-63 and Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, paras 26-61.

2 See Articles 21, 45, 49 and 56. It is settled case law that Article 21 TFEU, which lays down a general right for every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in the provisions on the free movement of economic actors. See*, e.g.*, ECJ, Case C-193/94 *Skanavi* [1996] E.C.R. I-929, para. 22 (on the freedom of establishment); ECJ, Case C-100/01 *Oteiza Olazabal* [2002] E.C.R. I-10981, para. 26 (on the free movement of workers); ECJ, Case C-208/05 *ITC* [2007] E.C.R. I-181, para. 64 (on the freedom to provide services).

3 See now Directive 2004/38 which has replaced earlier legislation laying down the conditions of free movement rights for specific categories of persons (see the discussion in Chapter 5, *infra*).

4 See the detailed discussion in Chapter 5, *infra*. The right of residence was extended to family members of Union citizens for perhaps two main reasons, namely 1) in the absence of such rights, Union citizens could be discouraged from exercising their free movement rights and 2) such is arguably necessary in order to comply with the fundamental right to respect for family life as laid down *inter alia* in Article 8 ECHR.

respect to immigration and controls at the external borders of the Union[5] and since the Treaty of Lisbon, the Union has even become competent to develop a "common immigration policy".[6] However, this shared competence[7] concerns mostly "flanking measures" and harmonization measures, and the level of harmonization achieved so far is rather limited.[8] As a consequence, it is generally speaking the Member States that are competent to regulate the first admission of third country nationals to their territory, although they must thereby respect Union legislation enacted in the field.[9] Summarizing, one could say that the Union is competent for the "internal aspect" of the free movement of persons, whereas the "external aspect" remains largely within the ambit of Member State competences.[10] In any event it is clear that the specific free movement rights conferred on Union citizens by the provisions on Union citizenship only apply within the territory of the Member States and not between Member States and third countries.

As a result of this conjunction of competence areas, it is not immediately clear who is to have competence regarding non-EU family members of a Union citizen who have never legally resided in a Member State. In theory, two points of view are possible. The first one starts from looking at the position of the non-EU family member of a Union citizen: since he or she has never entered the Union before, the conditions surrounding his or her entry into the territory of the Member States must be subject to the rules adopted in the field of immigration, for which the Member States remain principally competent. The second point of view rather takes the situation of the Union citizen as a starting point. He or she would be discouraged from exercising his or her freedom to move and reside in another Member State if he or she could not be joined in that Member State by his or her non-EU family members. Consequently, the Union should be held competent to regulate the entry and residence rights of family

---

5 See former Title IV of Part Three of the TEC, in particular Articles 61(a)-(b), 62 and 63 TEC.

6 For a discussion of this competence and its evolution, see Peers *EU Justice and Home Affairs Law* (3rd ed.) (Oxford, Oxford University Press, 2011), 1100 pp. and Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), Chapter 10.

7 See the explicit mention of the "area of freedom, security and justice" in Article 4(2)(j) TFEU.

8 See Peers *EU Justice and Home Affairs Law* (2nd ed.) (Oxford, Oxford University Press, 2006), at 240 (noting that it has been difficult to agree on rules on migration at Union level, and that the rules which have been agreed have generally been "unambitious").

9 The two most important Union measures adopted in the field are Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12 and Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] O.J. L16/44. For more detailed information on the different Union measures adopted, see Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 323-326 and the literature referred to.

10 Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, paras 30-35. This distinction is exemplified by Article 3(2) TEU, which provides: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". See, in the same vein, Article 67(2) TFEU: "[The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals". See also former Article 62 TEC, which provided for a different competence of the EC with regard the crossing of internal borders on the one hand (Article 62(1)) and the crossing of external borders on the other hand (Article 62(2) TEC).

members, including non-EU family members, of Union citizens, at least in the case of "moving" Union citizens.

The ECJ, in its case law until *Metock and Others*, had never clearly taken position. In fact, earlier case law of the ECJ presents a somewhat ambiguous image, with the ECJ apparently shifting between these two points of view.[11] On the one hand, there was the famous *Akrich* case,[12] in which the ECJ notably held that the non-EU spouse of a Union citizen could only benefit from the rights she derived from Regulation 1612/68[13] once she was lawfully resident in a Member State, while her access to the territory of the Union remained subject to the conditions of national immigration law.[14] The ECJ essentially came to this conclusion by stressing the limited scope of the Union's competence regarding the free movement of persons. It held that Regulation 1612/68 covered only freedom of movement *within* the Union and that it was "silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the Union".[15] It seemed to follow from *Akrich* that a Member State could refuse non-EU family members a right of residence on grounds of non-compliance with the conditions of national immigration law if they had not previously resided lawfully on the territory of another Member State,[16] as long as this refusal would not infringe the right to respect for family life under Article 8 of the ECHR.[17]

In another line of cases, the Court rather embraced the second point of view, stressing the importance of protecting family life in order to guarantee the full effect of the provisions on free movement of Union citizens[18] and holding that, for non-EU family members of a Union citizen to enjoy the right of entry and residence in the Union, it was sufficient to demonstrate their family relationship with a Union citizen. Notably,

---

11 See also the very informative discussion in Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15 *E.L.J.*, 634-647.

12 ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607, with case notes by Luby in (2004) *Journal du droit international*, 580-581; Oosterom-Staples in (2004) *N.T.E.R.*, 77-83; Plender in (2004) *C.D.E.*, 261-288; White in (2004) *E.L. Rev.*, 385-396; Spaventa in (2005) *CML Rev.*, 225-239; Schiltz in (2005) *MJ*, 241-252.

13 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] J.O. L257/2 (see now Directive 2004/38).

14 Tryfonidou classifies the approach followed in *Akrich* as the "moderate approach". Another case that was decided following this moderate approach, according to the author, is ECJ, Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] E.C.R. 3723. See Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15 *E.L.J.*, 636-637.

15 ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607, para. 49.

16 This is clearly illustrated by a decision of the Irish High Court. In H.Ct. Ir., *S.K. and Anor. v. The Minister for Justice, Equality and Law Reform and Others.* [2007] I.E.H.C. 216, Justice Hanna decided that the prior lawful residence requirement of the 2006 Regulations was consistent with Directive 2004/38 and lawful, considering that the provision gave effect to Directive 2004/38 and to the judgment in *Akrich.*

17 ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607, para. 58.

18 The ECJ has observed in this regard that the Union legislature recognized the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaties. See ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, para. 38; ECJ, Case C-459/99 *MRAX* [2002] E.C.R. I-6591, para. 53; ECJ, Case C-157/03 *Commission v Spain* [2005] E.C.R. I-2911, para. 41; ECJ, Case 441/02 *Commission v Germany* [2006] E.C.R. I-3449, para. 109; ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, para. 44.

in *MRAX*,[19] the ECJ held that "the right of a third country national married to a Member State national to enter the territory of the Member States derives under Union law from the family ties alone"[20] and that a Member State was not permitted to refuse to issue a residence permit to a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully.[21] *MRAX* was decided before *Akrich*, but the ECJ confirmed the approach it had followed in *MRAX* in cases decided after *Akrich*.[22] In one of these cases, the ECJ confirmed that Member States could only refuse to grant a visa to a non-EU family member within the limited scope of refusal tolerated by Union law, such as refusals on grounds of public policy or public security.[23] From these judgments, it seemed to follow that Member States were precluded from making the right of entry conferred by Union law on non-EU family members of a Union citizen conditional upon a requirement of previous lawful residence in another Member State.

In *Jia*[24] the ECJ was presented with an ideal opportunity to explicitly address this apparent contradiction in its earlier case law.[25] The referring Swedish court essentially asked whether, in light of *Akrich,* non-EU family members of a Union citizen were to be refused a right of residence in a Member State if they had not previously been lawfully resident in another Member State.[26] However, the ECJ chose not to explicitly address the question of whether a condition of prior lawful residence was permitted under Union law.[27] It chose to confine its ruling in *Akrich* to the specific facts of that case, which it distinguished from the factual circumstances in *Jia*.[28] It explained that *Akrich* was not to be interpreted as holding that Union law

---

19 ECJ, Case C-459/99 *MRAX* [2002] E.C.R. I-6591, with case notes by Denys in (2002) *T.Vreemd.*, 388-391; Van Ooik and Staples in (2002) *N.T.E.R.*, 269 -276; Luby in (2003) *Journal du droit international*, 593-596; Martin in (2003) *Eur. J. Migration & L.*, 143-162.

20 ECJ, Case C-459/99 *MRAX* [2002] E.C.R. I-6591, para. 59.

21 *Ibid*., para. 80.

22 ECJ, Case C-157/03 *Commission v Spain* [2005] E.C.R. I-2911, para. 28; ECJ, Case C-503/03 *Commission v Spain* [2006] E.C.R. I-1097, para. 42. In both cases, the ECJ confirmed its finding in *MRAX* that the right of a third country national married to a Member State national to enter the territory of the Member States derives under Union law from the family ties alone.

23 ECJ, Case C-503/03 *Commission v Spain* [2006] E.C.R. I-1097, paras 43-47, with case notes by Martin in (2006) *Revue trimestrielle de droit européen*, 568-582; Muir in (2006) *R.D.U.E*, 172-177; Olesti Rayo in (2006) *Revista de Derecho Comunitario Europeo*, 989-1001; Oosterom-Staples in (2006) *N.T.E.R.*, 169-181; Brouwer in (2008) *CML Rev.*, 1251-1267.

24 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, with case notes by Elsmore and Starup in (2007) *CML Rev.,* 787-801; Martin in (2007) *Eur. J. Migration & L.*, 457-471; Oosterom-Staples in (2007) *N.T.E.R.,* 191-200; Tryfonidou in (2007) *E.L.Rev.*, 908-918; Woltjer in (2007) *SEW,* 303-306.

25 As was noted by AG Mengozzi: Opinion of AG Mengozzi in Case C-291/05 *Eind* [2007] E.C.R. I-10719, para. 46.

26 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 25.

27 This position is in contrast to that of AG Geelhoed, who explicitly acknowledged that the ECJ's case law in the field was not entirely free from ambiguity, observing that the ECJ "has adopted both a generous and a restrictive approach to the conditions under which the rights granted in secondary [Union] legislation to third-country-national family members of [Union] citizens can be invoked" (Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, para. 38).

28 The Court emphasised in this regard that in the *Jia* case it was not alleged that "the family member in question was residing unlawfully in a Member State or that she was seeking to evade national immigration legislation illicitly" (ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 31). This has prompted some commentators to suggest that the ECJ was drawing a distinction between cases in which a non-EU family member had resided unlawfully in another Member State before moving to the host Member State and cases in which the non-EU family member

requires Member States to make the grant of a residence permit to non-EU family members of a Union citizen subject to a condition of prior lawful residence.[29] As a result, even after *Jia* there remained a considerable degree of confusion regarding the scope of Member States' competence in relation to admitting non-EU family members.[30] In particular, it was unclear to what extent Member States were *permitted* to make the right of residence of non-EU family members of a Union citizen dependent on a condition of prior lawful residence in another Member State.

Eind[31] was the last case before *Metock and Others* in which the Court was faced with the question whether the first entry of non-EU family members of a Union citizen into the territory of the Union could be made subject to restrictive conditions of national immigration law. Mr. Eind, a Netherlands national, had worked in the United Kingdom and had lived there with his Surinamese daughter, who had been given a residence permit by the UK authorities as family member of a Union worker.[32] Upon his return to the Netherlands, Mr. Eind claimed that his daughter, Ms. Eind, was entitled to residence there under Union law as his family member. The Court accepted this claim and stated that:

> "This finding is not affected by the fact that, before residing in the host Member State where her father was gainfully employed, Miss Eind did not have a right of residence, under national law, in the Member State of which Mr Eind is a national."[33]

Accordingly, the *Eind* judgment seemed to further confirm the Court's holding in *Jia*[34] that prior lawful residence under the national law of a Member State was not required for family members of Union citizens in order to derive residence rights from Union law. *Eind* did not, however, completely clarify this issue, for a number of

---

had not resided in any Member State before moving to the host Member State. Only in the second type of cases would the non-EU family member derive residence rights from Union law; the first type of cases would remain governed by *Akrich* and thus national restrictive conditions would apply to the residence rights of the family member in question. See, in this sense, Olivier and Reestman, "No Legal Residence Requirements for the Admission of Family Members with a Third-country Nationality of Migrated Union Citizens" (2007) 3 *EuConst*, 467; see also already Spaventa, "Case C-109/01, Secretary of State for the Home Department v. H. Akrich", 42 (2005) *CML Rev.*, 233. This interpretation is in any event no longer in accordance with the ECJ's case law after the *Metock and Others* judgment (see the discussion under II.B., *infra*).

29 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, paras 30, 33. For a discussion of this narrow reading of the *Akrich* case, see Olivier and Reestman, "No Legal Residence Requirements for the Admission of Family Members with a Third-country Nationality of Migrated Union Citizens" (2007) 3 *EuConst,* 463-475.

30 This is neatly illustrated by the fact that in the main proceedings in *Metock and Others*, the *Jia* case was cited both by the applicants and by the Minster for Justice in support of their positions. See H.Ct. Ir., *Metock and Others v. MJELR* [2008] I.E.H.C. 77, paras 51 and 58-60. See also Vermeulen, "*Akrich*, *Commissie/Spanje, Jia*: Nog steeds geen *Eind* aan de onduidelijkheid over eerste toelating van derdelanders/gezinsleden van EU-migranten", in *Migration Law and Sociology of Law, Collected Essays in honour of Kees Groenendijk* (Nijmegen, Wolf Legal Publishers, 2008), 495-502.

31 ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, with case notes by Bierbach in (2008) *EuConst,* 344-362; Coutts in (2008) *R.D.U.E.*, 167-173; Martin in (2008) 10 *Eur. J. Migration & L.,* 365-379; Venekamp in (2008) *N.T.E.R.*, 130-136.

32 There was some confusion as to whether Ms. Eind's right of residence was based on national law or on Union law. The ECJ followed the national court in this regard and decided the case on the assumption that this right of residence was based on Union law.

33 ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, para. 41.

34 Curiously, the *Jia* judgment was not referred to by the ECJ; it was, however, discussed by AG Mengozzi in his opinion to the case.

reasons. First of all, the Court's judgment is not clearly drafted and the reasoning followed does not always seem consistent, which makes it hard to derive any underlying principles from it.[35] Second, it is unclear to what extent the specific circumstances of the case - such as the fact that Mr. Eind had been a worker rather than a non-economically active migrant Union citizen, the fact that Ms. Eind had been given a residence permit by the UK authorities and the fact that a residence right was claimed in the Member State of which Mr. Eind was a national -, dictated the Court's judgment. Lastly, the Court did not mention the *Akrich* judgment and did not therefore shed light on its continued relevance. Consequently, even after *Eind*, the problematic apparent contradiction between the two lines of cases outlined above remained in existence.[36] It was only with the judgment in *Metock and Others*, which explicitly reversed the *Akrich* case, that this contradiction was resolved. The *Metock and Others* judgment will be discussed in some detail in the following.

B. *Metock and Others* and the emphasis on the Union citizen

1. Case

a) Facts

Metock and Others in fact involved four cases lodged before the Irish High Court, which were joined for the purpose of convenience.[37] In each of these cases,[38] a non-EU national had travelled to Ireland and had lodged an asylum application there, which was eventually refused. However, after arriving in Ireland, each of them had married a national of another Member State who was living and working in Ireland. They subsequently applied for residence cards as the spouses of a Union citizen, but their applications were refused by the Irish Minister for Justice, Equality and Law Reform (*hereinafter* "Minister for Justice").

The Minister for Justice based his refusal on the *European Communities (Free Movement of Persons) Regulation 2006 (S.I. No. 2)* ("2006 Regulations"), which transposed Directive 2004/38 into Irish law. Under Regulation 3(2) of the 2006

35 As is poignantly explained by Martin (Martin, "Comments on Gouvernement de la Communauté française and Gouvernement wallon (Case C-212/06 of 1 April 2008) and Eind (Case C-291/05 of 11 December 2007)" (2008) 10 *Eur. J. Migration & L.*, 375-379).

36 Admittedly, it was possible to reconcile both lines of cases by taking a narrow reading of the *Akrich* case and limiting its scope to cases of illegal residence in a Member State (see n. 28, *supra*). Still, this reconciliation was based on a rather tentative reading of the *Akrich* case, which did not have any firm foundation in the case law of the ECJ and was therefore surrounded by legal uncertainty.

37 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, with case notes by Cambien in (2009) 15 *Colum. J. Eur. L.,* 321-341; Costello in (2009) 46 *CML Rev.,* 587-622; Currie in (2009) 34 *E.L. Rev.,* 310-326; Dautricourt in (2008) *R.D.U.E.*, 858-866; Fahey in (2009) *L.I.E.I.*, 83-89; Hammamoun and Neuwahl in (2009) *Revue trimestrielle de droit européen*, 91-104; Martin in (2009) 11 *Eur. J. Migration & L.,* 95-108; Venekamp in (2009) *N.T.E.R.*, 84-89 and Groenendijk and Fernhout in (2010) *Asiel en Migrantenrecht*, 4-16.

38 For a more detailed account of the facts of each of the cases (which were labelled the "Metock case," the "Ikogho case," the "Chinedu case," and the "Igboanusi case" by the ECJ), see ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 18-37.

Regulations, spouses of Union citizens were only entitled to a right of residence in Ireland if they had been lawfully resident in another Member State and if they were either entering Ireland in the company of their husbands or seeking to join their husbands who were already lawfully resident in Ireland. These conditions were not present in three of the four cases, given that evidence of legal residence in another Member State prior to arrival in Ireland was lacking.[39] In the remaining case, the refusal of the Minister for Justice was based on the fact that the husband was unlawfully resident in Ireland at the time of his marriage to a Union citizen.[40] Nevertheless, the Irish High Court took the view that the conditions of Regulation 3(2) of the 2006 Regulations were relevant to this case, too.[41]

The main proceedings were brought by the non-EU nationals concerned, their spouses, and, in one case, their minor children. The applicants essentially argued that the condition of prior lawful residence stated in Regulation 3(2) of the 2006 Regulations was not compatible with Directive 2004/38.[42] The Minister for Justice, the adversary in the main proceedings, replied essentially that Directive 2004/38 did not preclude this condition because the Directive only applied to the movement of Union citizens and their family members *within* the Union, whereas the Member States retained competence in relation to the admission into a Member State of non-EU nationals coming from *outside* Union territory.[43]

b) Judgment

The ECJ firmly rejected the argument of the Minister for Justice and held that Directive 2004/38 precludes national legislation imposing a requirement of prior lawful residence such as the one contained in Regulation 3 of the 2006 Regulations. It based this finding on two main arguments.

In the first place, the ECJ pointed out that none of the provisions of Directive 2004/38 concerning family members of Union citizens makes the application of the Directive conditional on their having previously resided in a Member State.[44] It added that some of these provisions would rather justify the conclusion that the Directive is capable of applying to family members who were *not* already lawfully resident in another Member State.[45] In this regard, the ECJ pointed out that Article 5(2) of the Directive confers rights on family members who do not possess a "residence card" and cannot therefore provide evidence of residence for more than three months in a Member State[46] and that Article 10(2) of the Directive, which lists exhaustively the documents which non-EU family members may have to present to the host Member

39 See ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 21, 30 and 35.
40 *Ibid*., para. 26.
41 *See* H.Ct. Ir., *Metock and Others v. MJELR* [2008] I.E.H.C. 77, paras 147-48.
42 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 39-42.
43 *Ibid.*, paras 43-44.
44 *Ibid.*,, para. 49.
45 *Ibid*., para. 54.
46 According to Article 10(1), the right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen". A residence card evidences a right of residence for more than three months in a Member State (Article 9(1) of the Directive).

State in order to have a residence card issued, does not list any documents intended to demonstrate prior lawful residence in another Member State.[47]

That interpretation of the Directive was further supported, according to the ECJ, by its earlier case law[48] in which it had, on the basis of Union free movement legislation predating Directive 2004/38, struck down restrictions on the right of non-EU family members to join a national of a Member State, because they restricted the free movement rights of the latter.[49] However, the ECJ also explicitly recognized that in *Akrich* it had itself viewed prior lawful residence in another Member State as a condition to be fulfilled by a non-EU spouse of a Union citizen in order to benefit from a right of entry and residence in a Member State. In *Metock and Others*, the ECJ considered this finding no longer justified, and it decided to explicitly overturn it, holding that the benefit of the said rights could not depend on prior lawful residence in another Member State.[50]

In the second place, the ECJ held this interpretation of Directive 2004/38 to be consistent with the division of competences between the Member States and the Union.[51] It pointed out that the Union is competent to enact the necessary measures to bring about freedom of movement for Union citizens.[52] This freedom would be obstructed if it were impossible for a Union citizen to be accompanied or joined by his family members in the host Member State, because such would be liable to discourage him from exercising his rights of entry into and residence in that Member State, and this irrespective of whether those family members had previously legally resided in another Member State or not. Consequently, the Union legislature was competent to regulate in Directive 2004/38 the conditions of entry and residence of family members in the host Member State, including their first access to the territory of the Union.

The Irish High Court had also referred a second question to the ECJ,[53] which concerned the interpretation of Article 3(1) of Directive 2004/38. That article reads: "This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members…who

47 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 52-53.

48 The Court referred to the cases cited in n. 18, *supra*.

49 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 56-57.

50 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 58. The ECJ added that this conclusion, reached on the basis of earlier Union legislation on free movement of persons, held good *a fortiori* with regard to Directive 2004/38, which aims at "strengthening the rights of free movement and residence of all Union citizens compared to their rights under earlier instruments of secondary law" (*Ibid.,* para. 59).

51 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 61-65.

52 According to the ECJ, this competence derived from Articles 18(2), 40, 44, and 52 TEC [*current Articles 21(2), 46, 50 and 59 TFEU*] on the basis of which Directive 2004/38 was adopted (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 61).

53 For the sake of completeness, it must be pointed out that the Irish High Court also referred a third question to the ECJ (see ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 47). This third question was to be answered only if the ECJ answered the second question in the negative. As will be seen below, this was not the case.

accompany or join them" (emphasis added).[54] As explained above, in each of the four cases before the High Court a non-EU national had entered Ireland before marrying a Union citizen there. The referring Court was essentially asking whether, under those circumstances, they were "accompanying" or "joining" a Union citizen as a family member in the sense of Article 3(1) of the Directive. As a result, the ECJ had to reach a decision on two main issues. First, whether a Union citizen must already have founded a family at the time when he moves to the host Member State in order for his non-EU family members to be able to enjoy the rights established by Directive 2004/38. Second, whether a national of a non-member country who has entered a Member State before becoming a family member of a Union citizen residing in that Member State, accompanies or joins that Union citizen within the meaning of Article 3(1) of Directive 2004/38.

The ECJ answered this second question in the affirmative. It justified its wide reading of Article 3(1) by referring to the objective of Directive 2004/38, namely to facilitate the exercise of the right of Union citizens to move and reside freely within the territory of the Member States.[55] A more restrictive reading of Article 3(1), it pointed out, would allow the host Member State, under certain circumstances, to refuse non-EU family members of a Union citizen residing in its territory to join the latter. For instance, a third-country national who had entered the host Member State before marrying a Union citizen residing in that Member State or who had married a Union citizen before the latter established himself in that Member State could be refused a right of residence by that Member State. Such would be liable to discourage the Union citizen concerned from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country.[56] That would clearly undermine the objectives of Directive 2004/38. The ECJ concluded that for the applicability of Article 3(1) of Directive 2004/38 it was not relevant when and where[57] the marriage between a Union citizen and his non-EU spouse took place or how the latter entered the host Member State.[58]

2. Analysis

Given the considerable degree of confusion regarding the delimitation of competences of the Union and the Member States vis-à-vis non-EU family members of moving Union citizens - resulting from the case law discussed higher[59] - the importance of the

---

54 Similarly, Articles 6(1) and 7(1)(d) of Directive 2004/38, relating respectively to the right of residence for up to three months and the right of residence for more than three months, require that non-EU members of a Union citizen "accompany" or "join" him in the host Member State in order to enjoy a right of residence there, as the ECJ pointed out. See ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 86.

55 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 82 (referring to recitals 1, 4, and 11 of Directive 2004/38).

56 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 89, 92.

57 The ECJ held in this connection that neither Article 3(1) nor any other provision of Directive 2004/38 contains requirements as to the place where the marriage of the Union citizen and the national of a non-member country is solemnised (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 98).

58 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 99. The ECJ confirmed this finding in ECJ (Order of 19 December 2008), Case C-551/07 *Sahin* [2008] E.C.R. I-10453, paras 24-33.

59 See the discussion under II.A., *supra*.

Metock and Others judgment is immediately apparent. The ECJ noted the ambiguity in its earlier case law surrounding the rights of non-EU family members under Union law and restored clarity by explicitly overturning its judgment in *Akrich.* Such explicit reversal is a very unusual step for the ECJ to undertake[60] and its extraordinary character is put into relief by the fact that the *Akrich* judgment was pronounced fewer than five years before the judgment in *Metock and Others.*[61] Consequently, the ECJ now appears to have unambiguously embraced the second point of view set out above. In *Metock and Others,* it took the impact of family life on the free movement of Union citizens as a focal point and concluded that the Union is competent to regulate the entry and residence of family members of Union citizens in the Member States.[62] It clearly ensues that Member States are not *permitted* under Union law to impose a condition of prior lawful residence with regard to the residence rights enjoyed by non-EU family members of a Union citizen.

The question that needs to be answered is whether the ECJ's reasoning is convincing. This requires an analysis of the different arguments advanced by the ECJ in its judgment in *Metock and Others*. The first set of arguments of the ECJ was based on the provisions of Directive 2004/38. The Court cited a number of those provisions as evidence for its holding that no requirement of prior lawful residence could be imposed. In my view, however, the provisions of the Directive do not provide much guidance in this regard, as they are essentially silent on the matter.[63] This is not in my view the most convincing part of the judgment, therefore. On a related note, it must be observed that it is far from clear to what extent the entry into force of Directive 2004/38 played a role in the outcome of the judgment. Arguably, the Court could have reached exactly the same outcome under the instruments of secondary law predating Directive 2004/38.[64] In this regard, the fact should not be overlooked that

---

60 This explicit reversal is almost unprecedented in the case law of the ECJ. For an exceptional case in which the ECJ explicitly overturned earlier case law, see ECJ, Case C-10/89 *SA CNL-SUCAL NV v. HAG GF AG* [1990] E.C.R. I-3711, para. 10. See also ECJ, Joined Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] E.C.R. I-609, paras 14-16.

61 The *Akrich* judgment, 2003 dates from September 23, 2003; the *Metock and Others* judgment dates from 25 July 2008.

62 Snell draws an interesting parallel with the Court's case law on the free movement of goods, in which the Court once adopted a very broad interpretation of those provisions, which was later reversed with the famous *Keck* judgment. Snell notes: "Altogether, cases such as *Carpenter, Commission v Netherlands, Government of the French Community and Walloon government* and *Metock* create a certain sense of *déjà vu*. Just like in the field of goods prior to *Keck*, the Court adopts a very wide view of the scope of the free movement provisions, tackling rules that are capable of impeding or dissuading free movers or making the exercise of free movement rights less attractive" (Snell, "The Notion of Market Access: A Concept or a Slogan?" (2010) 47 *CML Rev.*, 465).

63 Currie has correctly remarked that the Court was essentially relying on what Directive 2004/38 did *not* say and that the Court perhaps implicitly considered that the Union legislator could have explicitly codified the *Akrich* case law if it considered that a condition of prior lawful residence should apply (Currie, "Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock" (2009) 34 *E.L. Rev.*, 320-321). If the Court was of this opinion, it should perhaps have stated this explicitly. Moreover, this point of view fails to convince, as the provision relied on by the Court in *Akrich* was taken over by Directive 2004/38. AG Poiares Maduro takes a more realistic view, in my opinion, stating that Directive 2004/38 does not provide an explicit answer to this issue (View of AG Poiares Maduro, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 5).

64 In this sense, Martin, "Comments on *Förster* (Case C-158/07 of 18 November 2008), *Metock* (Case C-127/08 of 25 July 2008) and *Huber* (Case C-524/06 of 16 December 2008)" (2009) 11 *Eur. J. Migration & L.,* 95-108.

the Court explicitly cited older case law, decided before the entry into force of Directive 2004/38, in support of its findings. At the same, the fact that Directive 2004/38 is expressly stated, in its recitals to "strengthen the right of free movement and residence of all Union citizens", as pointed out by the Court, might have provided some additional support to the Court's broad interpretation of the free movement provisions.[65]

The crux of the Court's reasoning was formed by its interpretation of the Union's competence regarding the free movement of Union citizens. This interpretation was founded on the Court's interpretation of the aims pursued by the provisions of Directive 2004/38 and the consequences thereof for the rights enjoyed by non-EU family members of Union citizens. It is this part of the judgment which needs critical analysis. After analysing whether and to what extent the Court's interpretation of the scope of the Union competence regarding the free movement of Union citizens is convincing (a), I will analyse its impact on the competences of the Member States and consider whether it leaves sufficient scope for the latter to pursue an effective immigration policy (b).

a) Division of competences

In *Metock and Others,* the Court rightly pointed out that the Union derives its competence for granting rights to family members from the fact that ensuring the protection of family life is necessary to eliminate obstacles to the exercise of free movement rights. It naturally follows then that the Union should be considered competent to grant residence and entry rights to family members as long as the absence of these rights would constitute an obstacle to the free movement of Union citizens between the Members States, that is, to the "internal aspect" of the free movement of persons. Only in the absence of such impact, the focus of the analysis should be on the movement of the non-EU family members, and thus possibly on the "external aspect" of the free movement of persons, for which the Member States remain principally competent. This view is further supported by the fact that the rights of family members are not autonomous rights but rights that are "parasitic" on the rights of the Union citizen they are related to.[66]

The question to be answered then is whether the refusal of a right of residence to a non-EU family member of a Union citizen constitutes such an obstacle. This entirely depends on how the free movement provisions are interpreted. The point is perfectly illustrated when the reasoning adopted by the ECJ in *Akrich* is compared with the reasoning followed by the ECJ in *Metock and Others*. In *Akrich*, the ECJ took the view that the exercise of the right to free movement is only discouraged by a refusal of residence rights to family members of a Union citizen if it entails for the latter the loss of the right to be joined by his family members. The ECJ further observed that such is only the case if the citizen concerned was lawfully residing with his family

---

65 See the discussion in Currie, "Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock" (2009) 34 *E.L. Rev.*, 319-322. The Court has also relied on this element to provide a generous interpretation of the provisions of Directive 2004/38 in other cases (see, *e.g.*, ECJ, Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 49).

66 See also n. 108, *infra*, and ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, paras 23, 24 and 30.

members in a Member State before moving to the host Member State. Otherwise, he would not be treated less favourably in the host Member State than in the home Member State, and hence not be discouraged to move there in any way.[67] The ECJ was essentially comparing the conditions for family reunification enjoyed in the home Member State with those in the host Member State and considered that there would only be an obstacle to the exercise of free movement rights if the latter were less favourable than the former.

In *Metock and Others*, by contrast, the ECJ considered that the refusal of a right of residence to a non-EU family member of a Union citizen constitutes an obstacle to the exercise of free movement rights, even where the non-EU family member did not previously reside legally in another Member State. This point of view cannot be explained when merely the conditions relating to family reunification enjoyed in the home Member State are compared with those applicable in the host Member State. Not surprisingly, some commentators,[68] reasoning along the lines of *Akrich,* have criticised the Court's judgment in *Metock and Others* for recognising the possibility for Union citizens to rely on Union provisions relating to family reunification even in situations where no actual obstacle to the exercise of free movement rights was involved.[69] As will become clear from the following, I do not agree with this criticism. The Court's judgment becomes convincing if other considerations are taken into account. In my view, the Court based its judgment probably on two main considerations, while two additional considerations may also have influenced the Court's decision. These considerations will be discussed in what follows.

i) Considerations supporting a broad construction of the free movement provisions

In the first place, it must be pointed out that, if Member States were permitted but not required to impose a condition of prior lawful residence, some Member States would allow non-EU family members who had not previously resided legally in another Member State[70] to their territory, whereas others would refuse them. As a consequence, a Union citizen would incur a disadvantage when exercising his free movement rights by moving to a Member State of the second category rather than one belonging to the first category because thereby he would be denied the right to family reunification which he could have enjoyed otherwise.[71] It is clear that this discouraging effect would create an obstacle to the exercise of free movement rights to a Member State of the second category, precisely where the non-EU family member had not previously resided legally in another Member State.

---

67 ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607, paras 52-54; Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, para. 71.

68 See Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15 *E.L.J.*, at 648-653. The author makes a similar argument in another article, which has the rights of economically active Union citizens as its prime focus (Tryfonidou, "In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?" (2009) 46 *CML Rev.,* 1591-1620).

69 In the European Law Journal article concerned, Tryfonidou concentrates on the rights for family members of Union citizens and on the cases *Eind, Metock and Others* and *Sahin* and voices the familiar criticism that in these cases no obstacle to the exercise of free movement rights was present, since no right was *lost* by moving from one Member State to another one.

70 And who did not satisfy the conditions of national immigration laws.

71 See in this sense, the View of AG Poiares Maduro, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 9.

This first consideration is clearly present in the Court's judgment in *Metock and Others*. The Court pointed out that, under the narrow reading of "obstacles" in *Akrich*, the free movement of persons would vary from one Member State to another, as some Member States would be permitting entry and residence of their family members, whereas others would not.[72] Such would run counter to the objective of the internal market, as set out in Articles 3(3) TEU and 26 TFEU – and, one might add, to the objective of a Citizens' Europe - which presupposes that Union citizens can travel from one Member State to the other enjoying the same rights and conditions in every Member State. Accordingly, in *Metock and Others*, the Court did not content itself by merely comparing the conditions relating to family reunification present in the home Member State and the host Member State. It also took account of the potentially different conditions in other Member States. As such, the Court indicated the need for a "level playing field" as regards the rights of entry and residence of non-EU family members of Union citizens in the Member States, in a way reminiscent of its seminal *Micheletti* judgment.[73] Consequently, the fact that different Member States could potentially enact different conditions with regard to the first access of non-EU family members of Union citizens should be considered sufficient to trigger the Union's competence regarding free movement of persons.

However, this first consideration alone does not provide a satisfactory basis for the Court's judgment, for two reasons. First, it is generally accepted that the free movement provisions should not be triggered by obstacles which are merely potential. While it is possible that the situation described above, with some Member States requiring prior lawful residence in contrast to others, would result from a more narrow interpretation of the free movement provisions, it could also give rise to the possibility that *all* Member States would require prior lawful residence.[74] In such a scenario, a level playing field would already ensue from a more narrow interpretation of the free movement provisions, at least in the sense that all Member States would require compliance with the immigration laws of one Member State before granting residence rights to non-EU family members.[75] Second, the first consideration does not give a wholly convincing justification for applying the free movement provisions in circumstances such as the one present in *Metock and Others*, in which a residence right is refused to a non-EU family member only a considerable time after the Union citizen concerned has moved to the host Member State. As has been rightly pointed out in legal literature, it cannot immediately be seen how such refusal would, in those circumstances, discourage a Union citizen from moving to the host Member State.[76] One could reply to that concern that a Union citizen could be discouraged from moving to a Member State with stricter immigration laws because such might in the

---

72 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 67.

73 ECJ, Case C-369/90 *Micheletti* [1992] E.C.R. I-4239, para. 12 ("That conclusion is reinforced by the fact that the consequence of allowing such a possibility would be that the class of persons to whom the [Union] rules on freedom of establishment were applied might vary from one Member State to another"). See also the detailed discussion in Chapter 2.

74 Especially in a context of difficult economic circumstances and political pressure to reduce immigration.

75 The immigration laws of the different Member States would obviously not be identical in scope or requirements.

76 See Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15 *E.L.J.,* 634-653. Similar observations apply with regard to the *Jia* case; see Tryfonidou, "Jia or 'Carpenter II': The edge of reason" (2007) 32 *E.L. Rev.,* 908-918.

future prevent him from being joined by a non-EU (future) family member. That explanation may be considered less than satisfactory, because of its hypothetical construct. The stated problem however completely disappears if the following, second consideration is taken into account.

In the second place, it must be emphasised that Directive 2004/38 not only confers a right to free movement, but also a right of residence in the host Member State, as is prominently stated in its title.[77] A refusal of a right of residence to a non-EU family member of a Union citizen may not only interfere with that citizen's right to free movement, but equally with his right of residence. If a Union citizen would not, in the absence of prior lawful residence, have the right of to be joined by a non-EU family member, such would interfere with his continued residence in that Member State. He would be forced to leave the Member State of residence of his choice and move to another Member State or even a third country in which he would be entitled to live together with his family members. On this line of reasoning, it is clear that a refusal of a right of residence by the host Member State to a non-EU family member would trigger the competence of the Union.

This second consideration was explicitly presented in the View of AG Poiares Maduro[78] and figured also in the judgment of the Court, in particular in its answer to the second question, concerning the interpretation of Article 3(1) of Directive 2004/38.[79] In reply to that question, the Court stated that a Union citizen has the right to be joined by family members even if he founded a family after establishing himself in the host Member State. The absence of such a right would not have been an obstacle to the free movement of persons under the narrow *Akrich* interpretation, because the Union citizen in the situation described cannot be said to lose, when moving to the host Member State, the right to legally reside with his family members. Yet the ECJ held in *Metock and Others* that it would constitute an obstacle to the free movement rights of the Union citizen concerned because it would be "such as to discourage him from continuing to reside there and encourage him to leave".[80] In other words, the ECJ focused on the "fundamental" right of residence[81] and the impact of a refusal of a residence right to family members on the enjoyment of this right.

When the second consideration is taken into account, a satisfactory reply can be given to the two problems stated higher. First, it is clear that, even if all Member States were to impose a condition of prior lawful residence, the refusal of a right of

---

77 AG Poiares Maduro has observed in this connection that Directive 2004/38, in contrast to earlier instruments on the free movement of persons, "places equal emphasis on the right to reside freely within the territory of the Member States" and that it is therefore "no longer only the mobility but also the stability and permanence of residence in another Member State that is intended to be secured" (View of AG Poiares Maduro, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 13).

78 View of AG Poiares Maduro, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 13.

79 Yet, more implicitly, this conception also figures in the Court's answer to the first question. See in particular ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 63 ("The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to *or residing in* that Member State"; emphasis added) and para. 64.

80 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 89.

81 See ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 89.

residence to family members would amount to an obstacle to the right of residence of the Union citizen concerned, since such refusal might force the latter to leave to a third country, a possibility explicitly pointed at by the Court.[82] Accordingly, the Court went further in *Metock and Others* than merely taking the potential conditions relating to family reunification in all Member States into account and requiring a "level playing field". It also explicitly referred to the possibility of family reunification in a third country. Second, it is clear that, in circumstances where a Union citizen is only joined by a non-EU family member after his move to the host Member State, a refusal of a right of residence will obviously interfere with his continued residence in that State. Consequently, the criticism voiced in legal literature in the sense that the Court in cases like *Metock and Others* is no longer concerned with obstacles to free movement rights can be rejected.

A third consideration underlying the judgment in *Metock and Others* may have been the need to protect fundamental rights, the right to respect for family life in particular. As I have explained elsewhere,[83] the extension of residence rights to family members of Union citizens was prompted not only by the need to take away obstacles to the exercise of free movement rights, but also by the need to respect fundamental rights. This has been acknowledged by the Court in a number of important judgments.[84] This fundamental rights rationale has in fact been a strong additional ground relied on by the Court to give a broad interpretation to the rights enjoyed by family members of Union citizens. In *Metock and Others,* however, the Court, rather surprisingly, did not explicitly base its judgment on fundamental rights considerations. The only explicit reference to fundamental rights is found to the Court's observations on situations falling outside the scope of Union law.[85]

Yet, the fundamental rights rationale is, arguably, implicit in the Court's reasoning.[86] This appears from the Court's reference to the case law just mentioned, which is grounded on fundamental rights considerations. In this connection, it must also be remarked that the ECJ's reference to "normal family life" clearly echoes the order of the President in the case.[87] In his order, the President considered that it was appropriate to apply the accelerated procedure because this would allow the Court to bring a swifter end to the legal uncertainty surrounding the scope of the free movement rights of non-EU family members, which was preventing the applicants from leading a "normal family life".[88] In this context, the President referred explicitly to the duty of the Union to respect Article 8 ECHR.

The need to respect the right to respect for family life may indeed have been seen by the Court as an additional ground for its broad interpretation of the free movement provisions.[89] Article 8 ECHR, in some circumstances, prevents Member States from

---

82 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 89.

83 See Chapter 5, *infra*.

84 A famous example is ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279.

85 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 79.

86 See Costello, "Metock: Free movement and 'Normal Family Life' in the Union" (2009) 46 *CML Rev.*, 614.

87 ECJ (Order of the President of 17 April 2008), *Metock and Others* [2008] E.C.R. I-6241.

88 See the discussion in Cambien, "Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform" (2009) 15 *Colum. J. Eur. L.*, 327-330.

89 While the need to respect fundamental rights does not in itself dictate the scope of Union law, it must inform the Court's interpretation of secondary free movement legislation.

deporting family members of Union citizens or refusing them a right of residence.[90] By holding that the Member States are not entitled to impose a condition of prior lawful residence, the Court in fact interpreted the free movement provisions in a way apt to avoid breaches of Article 8 ECHR. While it is rather unfortunate that the Court did not state these fundamental rights considerations explicitly, it was right in my view to ground its reasoning firmly in what I have called an "obstacles approach". The reason is that Article 8 ECHR leaves the Member State a considerable margin of discretion in applying their immigration laws. The Court's interpretation of the provisions of Directive 2004/38, by contrast, arguably leaves less scope for Member States to do so (see the discussion under II.B.2.b., *infra*). Consequently, the "obstacles approach" is preferable in order to guarantee the effective enjoyment of the free movement rights by Union citizens.

Finally, and for the sake of completeness, it should be remarked that the ECJ also referred to the provisions of Directive 2003/86 to support its interpretation of Directive 2004/38. Since the entry into force of Council Directive 2003/86,[91] third country nationals lawfully residing in the territory of the Member States have the right to be joined by their family members.[92] This right is evidently subject to certain conditions, but it is clear from the wording of the Directive that it cannot be made dependent on the condition that a family member has previously resided legally in another Member State. As the Court pointed out in *Metock and Others*, to interpret Directive 2004/38 as permitting such a condition would lead to an anomalous difference between the rights of family reunification enjoyed by third country nationals and those enjoyed by Union citizens.[93]

There is some force in this argument. At a general level, it seems logical that Union citizens should not derive fewer rights from Union law than third country nationals. Moreover, Directive 2003/86 in its preamble specifically refers to the aim of granting third country nationals "rights and obligations comparable to those of citizens of the European Union," as was agreed at the Tampere European Council.[94] In this sense, the Court's parallel interpretation of the two Directives[95] should certainly be welcomed, because it leads to some consistency to the Union rules on family reunification. Still, the argument derived from 2003/86 would not, in my view, in itself justify the broad interpretation of Directive 2004/38. The reason is that Directives 2004/38 and 2003/86 deal with fundamentally different legal regimes, and hence the parallelism between them is necessarily limited.[96] The conclusion must be that it is an interesting argument, but in second order only.

---

90 See the discussion in Chapter 5, *infra*.

91 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12.

92 See generally Peers *EU Justice and Home Affairs Law* (2nd ed.) (Oxford, Oxford University Press, 2006), at 213-218.

93 As the ECJ noted: ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 69.

94 Conclusions of the European Council held in Tampere on October 15 and 16, 1999 (1999) 10 EU.Bull point 1.6.1, para. 21.

95 Remark that in the *Chakroun* case, the Court, conversely, referred to the provisions of Directive 2004/38 – as interpreted in *Metock and Others* – when interpreting of Directive 2003/86 (see ECJ, Case C-578/08 *Chakroun* [2010] E.C.R. [2010] I-1839, para. 64).

96 Remark, for instance, that Directive 2004/38 requires an inter-State element, to the difference of Directive 2003/86. If the interpretation of Directive 2004/38 were to be completely axed on the provisions of Directive 2003/86, that requirement would no longer hold. This is not to say that an inter-State element is not relevant at all to the provisions on the right of free movement and

ii) Evaluation

The foregoing makes clear that the ECJ was ready in *Metock and Others* to adopt a broad conception of "obstacles" to the free movement of Union citizens and hence of the Union's competence in this connection. To the difference of *Akrich*, the ECJ did not consider it sufficient to merely compare the actual conditions surrounding family reunification in the host Member State with those applicable in the Member State where the citizen concerned was established before moving. Instead, the ECJ adopted a broader perspective, taking account of the fact that the potentially different conditions surrounding family reunifications in all the Member States would entail obstacles to the exercise of free movement rights. Moreover, the Court did not limit its focus to obstacles to the exercise of the right to free movement, but equally considered possible obstacles to the right of residence in the host Member State. This broad interpretation of the free movement provisions, entailing a broad construction of the rights enjoyed by non-EU family members of a Union citizen, is convincing, because it is apt to guarantee the effective enjoyment of the fundamental right to free movement and residence. It is apt, moreover, to comply with fundamental rights standards and leads to a more harmonised treatment under Union law of Union citizens and third country nationals as regards family reunification.

The consequence of the *Metock and Others* judgment is that non-EU family members of a Union citizen will have a right of residence in the host Member State, irrespective of whether they have previously resided legally in another Member State. However, as the Court explicitly confirmed, the Union citizen concerned must have moved to another Member State.[97] The reason is that otherwise the refusal of a right of movement to or residence in another Member State would not be obstructed. Once a Union citizen has moved to another Member State, however, he is also entitled to rely on Union law upon his return to his home Member State. The legal soundness and evolution of this point will be examined in detail below, under "III".

b) Scope for effective immigration policies in the Member States?

If we accept that the ECJ's broad interpretation of the rights enjoyed by non-EU family members is justified in order to guarantee the effective enjoyment of the free movement of Union citizens, the next issue to address is the impact of this broad construction on the immigration policies of the Member States. It is clear from the fact that ten Member States intervened in *Metock and Others* and from their strong support in favour of competence for the Member States to regulate the first access of non-EU family members to the Union territory that many Member States were

residence of third country nationals (see the discussion in Carrera and Wiesbrock, "Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU" (2010) 12 *Eur. J. Migration & L.*, 354-357), but it surely takes a less prominent place in that context, which illustrates the fundamental difference in the current legal regime governing Union citizens and third country nationals.

97 Namely a Member State of which he or she is not a national. After having moved to another Member State, the Union citizen concerened can invoke the said rights also upon his or her return to his or her home Member State.

concerned that the judgment would undermine their immigration policies. The intervening Member States submitted that, in a context typified by strong pressure of migration, it was necessary to control immigration at the external borders of the Union. They took the view that, if Directive 2004/38 were to be interpreted as prohibiting a host Member State from requiring prior lawful residence in another Member State, it would undermine the ability of the Member States to have an effective immigration policy because it would rule out an individual examination of all the circumstances surrounding a first entry into the Union.[98]

It cannot be denied that the interpretation followed by the Court will have an impact on the immigration policies of the Member States. It will have as a consequence that Member States will, under certain circumstances, have to grant a residence permit to third country nationals whom they would have previously refused one. In Ireland, for instance, a residence permit now normally has to be given to non-EU spouses in circumstances like those in *Metock and Others*, even though at the national level such was previously considered undesirable.[99] Given the *erga omnes* effect of preliminary rulings,[100] other Member States with immigration laws similar to the Irish 2006 Regulations have also had to remove certain restrictions to the residence rights of non-EU family members of Union citizens.[101] The net effect of this is that it will become easier for non-EU family members of a Union citizen to establish themselves in the Member States. Not surprisingly, in some Member States in particular, the *Metock and Others* judgment has provoked fierce negative reactions. For instance, in Denmark, high-ranking officials publicly reacted negatively to the judgment and the far-going impact it was perceived to have on the traditionally restrictive Danish immigration policies.[102] The UK, for its part, put forward draft conclusions in the Council which, according to some commentators, served to curtail or even ignore the legal consequences deriving from the *Metock and Others* judgment.[103]

Still, it is important to carefully analyse first the precise impact of the judgment on the competences of the Member States. It is a striking aspect of the *Metock and Others*

---

98 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 71.

99 See, for example, the interim decision in H.Ct. Ir., *Gogolova and Others v. Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 131.

100 See Lenaerts and Van Nuffel (Bray (ed.)), *Constitutional Law of the European Union* (2nd ed.) (London, Sweet & Maxwell, 2005), at 195.

101 The UK Asylum and Immigration Tribunal, for instance, accepted the *Metock and Others* judgment and noted that it would "affect a number of Tribunal and Court of Appeal decisions." (see HB (EEA right to reside - *Metock*) Algeria [2008] UKAIT 00069 (U.K.)).

102 See Kirk, "Danish immigration law under fire after EU court ruling", *EU Observer*, 29 July 2008, *available at* http://euobserver.com/9/26557. The Danish Prime Minister reacted to the judgment by stating that Denmark would not change its immigration laws, which contained provisions similar to the Irish provisions contested in *Metock and Others* (see Kubosova, "Rasmussen Defends Danish Immigration Rules Against EU Law", *EU Observer,* 28 August 2008, *available at* http://euobserver.com/9/26652). The negative Danish reaction was explicitly noted in the Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final. See also the detailed discussion in Lansbergen, "Metock, Implementation of the Citizens' Rights Directive and Lessons for EU Citizenship" (2009) 31 *Journal of Social Welfare and Family Law*, 285-297.

103 Peers, "The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms" (2008) *Statewatch Analysis*, available at www.statewatch.org/analyses/no-72-eu-attack-on-fundamental-rights-08.pdf.

judgment that the ECJ was at pains to emphasise the limited impact of its judgment, probably in reaction to the well-voiced concerns on part of the Member States regarding the possible loss of competence to pursue effective immigration policies. The ECJ explained that its judgment was limited in two important ways. On the one hand, it pointed out that the broad interpretation given to the free movement provisions would only benefit limited categories of persons. The scope of the interpretation was, in other words, limited *ratione personae*. On the other hand, the ECJ explained that the Member States are, within certain bounds, still able to restrict the right of residence of non-EU family members of Union citizens. These limitations can be labelled limitations *ratione materiae*. I will now analyse these different limitations, focussing on their extent and their possible consequences.

i) Limited impact

In the first place, the ECJ explained that the interpretation of Directive 2004/38 given in *Metock and Others* only concerns non-EU family members of a Union citizen who "accompany" or "join" him, provided that the other conditions of the Directive are also satisfied. This means, first, that Directive 2004/38 does not prohibit Member States from applying the full set of their immigration laws with regard to non-EU nationals who are not family members of a Union citizen in the sense of Article 2(2) of Directive 2004/38.[104] Accordingly, only persons belonging to one of limited categories of family members of a Union citizen benefit from the broad interpretation given by the Court. For instance, non-dependent ascendants,[105] collateral ascendants or siblings of a Union citizen cannot, in principle, rely on Directive 2004/38 in order to claim a right of residence in the host Member State. Second, only where the Union citizen concerned fulfils the classic condition of self-sufficiency,[106] will his family members enjoy a derivative right of residence in the host Member State. This excludes family members of a Union citizen who does not have sufficient resources to provide for their subsistence. Third, since Directive 2004/38 only grants rights to family members who "accompany" or "join" a Union citizen, it in fact limits the rights of entry and residence of these family members to the Member State in which that citizen resides.[107] Consequently, *Metock and Others* leaves the competence of the Member States with regard to non-EU nationals who are family members of a Union citizen who does not reside in their territory unaffected.[108] Lastly, the *Metock and Others* judgment in no way impacts on the competences of the Member States with regard to non-EU family members of a Union citizen in purely internal situations.[109]

---

104 See the detailed discussion in Chapter 5, *infra*.

105 See Article 2(2)(c) and (d) of Directive 2004/38. See the detailed discussion of the condition of dependency in Chapter 5, *infra*.

106 See Article 7(1) of Directive 2004/38.

107 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 94.

108 In *Eind*, the ECJ explicitly noted, with regard to the provisions on free movement of workers, that "[t]he right to family reunification under Article 10 of Regulation No 1612/68 does not entail for members of the families of migrant workers any autonomous right to free movement" and that it followed from this that "the right of a third-country national who is a member of the family of a [Union] worker to install himself with that worker may be relied on only in the Member State where that worker resides" (ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, paras 23-24).

109 That issue will be discussed in detail under III., *infra*.

In the second place, even the host Member State is still allowed to restrict the rights of entry and residence of non-EU family members of a Union citizen, within the confines of Directive 2004/38. This essentially leaves two main grounds on which a refusal or termination of residence can be based. First, under Article 27 of the Directive, the host Member State may restrict the free movement rights of non-EU family members of Union citizens on grounds of public policy, public security or public health, provided that such measures comply with the provisions of Chapter VI of the Directive.[110] Consequently, measures taken on grounds of public policy or public security must comply with the principle of proportionality[111] and with certain procedural safeguards,[112] and must be based exclusively on the personal conduct of the individual concerned. It is further specified that previous criminal convictions may not in themselves constitute grounds for invoking public policy or public security reasons and that the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[113] Accordingly, past offences will not normally justify a refusal of a right of residence.[114] Moreover, any restriction of the free movement rights adopted on the grounds mentioned has to be in accordance with fundamental rights, the fundamental right to respect for family life in particular.[115]

Second, under Article 35 of Directive 2004/38 (entitled "Abuse of rights"), the host Member State can refuse, terminate, or withdraw residence rights in the case of abuse of rights or fraud. This provision of the Directive in fact refers to the principle of abuse of law, which is a general principle of Union law.[116] The principle is often

---

110 Chapter VI of the Directive is entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health". Detailed guidance on the application of these provisions can be found in the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, which builds on the Commission Communication on the special measures concerning the movement and residence of EU citizens which are justified on grounds of public policy, public security or public health, COM(1999)372.

111 This implies that a less restrictive measure than a refusal of residence should not suffice to secure the interests involved.

112 See Article 31 of Directive 2004/38.

113 See Article 27(2) of Directive 2004/38. See also ECJ, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] E.C.R. I-5257, paras 66-68; ECJ, Case C-503/03 *Commission v Spain* [2006] E.C.R. I-1097, para. 46.

114 Accordingly, if *Akrich* would have been decided now, the previous infringements committed by Mr. Akrich would probably not have constituted grounds for refusing him a right of residence (see Costello, "Metock: Free movement and 'Normal Family Life' in the Union" (2009) 46 *CML Rev.*, 606). Nevertheless, particularly grave offences may still support such a refusal, as was clarified by the ECJ in *Tsakouridis* (ECJ, Case C-145/09 *Tsakouridis* [2010] E.C.R. nyr). The same may be true for persistent petty criminality: ECJ, Case C-349/06 *Polat* [2007] E.C.R., para. 35.

115 ECJ, Case C-145/09 *Tsakouridis* [2010] E.C.R. nyr, para. 50.

116 See Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 853. For a detailed discussion of its application in the case law of the Courts, see Sørensen, "Abuse of Rights in Community law: A principle of Substance or Merely Rhetoric?" (2006) 43 *CML Rev.*, 423-459; Waelbroeck, "La notion d'abus de droit dans l'ordere juridique communautaire", in *Mélanges en hommage à Jean-Victor Louis* vol. I (Brussels, Éditions de l'Université de Bruxelles, 2003), 595-616; Triantafyllou, "L'interdiction des abus de droit en tant que principe général du droit communautaire" (2002) *C.D.E.,* 611-632.

invoked in the context of the free movement of persons[117] by Member States who claim that individuals make improper use of Union law in order to generate more favourable rights than they would normally be entitled to. The Court has since long accepted that Member States may adopt measures to counter such abuses.[118] In other words, it appears that where an individual fraudulently or improperly relies on the free movement provisions, Member States may deny him or her the benefit of these provisions. In this sense, the principle of abuse can be seen as an exception or derogation to the free movement provisions, just like measures adopted on grounds of public policy, public security or public health. However, it appears that, just like the possibility for derogations on those grounds, the scope for Member States combating abuses of the free movement provisions is interpreted restrictively. Again, such measures may only be adopted if they are proportionate and in accordance with a number of significant procedural safeguards[119] and, again, such measures can only be adopted on a case-by-case basis.[120] Besides, measures adopted on the basis of Article 35 of the Directive must also comply with fundamental rights, in particular with the right to respect for family life and the right to marry.[121]

In the context of the rights enjoyed by family members of Union citizens, three types of "abuse" can be distinguished. In the first place, there are cases of what is commonly called "fraud". A good example in the context of the free movement of persons is the forgery of documents or the false representation of facts in order to rely on the benefits conferred by Union law on Union citizens and their family members.[122] For instance, a false passport or birth certificate could be used to fraudulently claim a family relationship with a Union citizen in order to qualify as his or her family member under Directive 2004/38. The treatment of cases of fraud under Union law is rather straightforward, since it is generally accepted and uncontroversial that, when fraud is present, an individual may be denied the benefits of Union law.[123]

In the second place, a Union citizen may attempt to create an artificial link with another Member State in order to bring himself within the scope of Union law and thereby claim the Union rights relating to family reunification, which are possibly more generous than those conferred by the national law of his Member State of residence. This type of abuse, which is related to the doctrine of "purely internal

---

117 The principle was in fact first announced by the Court in the famous *Van Binsbergen* case, concerning the free movement of persons (see ECJ, Case 33/74 *Van Binsbergen* [1974] E.C.R. 1299).

118 See, *e.g.,* ECJ, Case 33/74 *Van Binsbergen* [1974] E.C.R. 1299, para. 13; ECJ, Case C-212/97 *Centros* [1999] E.C.R. I-1459, para. 24.

119 Article 35 of the Directive provides: "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

120 See Sørensen, "Abuse of Rights in Community law: A principle of Substance or Merely Rhetoric?" (2006) 43 *CML Rev.*, 453

121 See, respectively, Articles 8 and 9 ECHR and Articles 7 and 9 of the EU Charter of Fundamental Rights.

122 See in this connection, the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final.

123 See Sørensen, "Abuse of Rights in Community law: A principle of Substance or Merely Rhetoric?" (2006) 43 *CML Rev.*, 431

situations", is discussed in detail under "III". In this context, it must already be emphasised that Union law does not allow Member States much scope to invoke this type of abuse in order to deny a person the rights conferred by Union law. First of all, it appears from the case law that the intention with which an individual relies on the Union free movement provisions is not relevant for the assessment of abuse.[124] Even Union citizens who create a link with another Member States for the apparent sole reason of escaping the more restrictive laws of their Member State of residence, do not for that matter abuse the free movement provisions.[125] Moreover, it appears that an acceptable link with another Member State can be very easily established, according to some lines of cases at least. Below, I defend the view that the required inter-State element should, arguably, be interpreted in a more demanding way than certain cases do, in order to create more legal certainty and to avoid the creation of arbitrary distinctions between Union citizens.[126]

In the third place, the free movement provisions can be abused by fraudulently establishing family relationships between a Union citizen and a non-EU national in order to enable the latter to claim the rights enjoyed under Union law by family members of Union citizens. This type of abuse is essentially linked to the problem of "marriages of convenience".[127] This is the type of abuse Article 35 of Directive 2004/38 is concerned with in the first place, as is apparent from its wording.[128] As such, the Directive confirms the judgment in *Akrich*, in which the Court held that there would be an abuse if the free movement provisions were relied on in the context of a marriage of convenience.[129] Such was explicitly stated not to be the case in the circumstances of the *Metock and Others* case.[130]

---

124 See, for instance, in the context of the free movement of workers: ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607, para. 55: "it should be mentioned that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity". See also Opinion of AG Poiares Maduro in Case C-255/02, *Halifax* [2006] E.C.R. I-1609, para. 70.

125 This is well illustrated by the *Zhu and Chen* case, in which the Court ruled that the fact that a Chinese mother went to Belfast in order to have her baby born there and acquire the Irish nationality because such would enable her to claim a right of residence in the UK, did not constitute an abuse of law (see ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925).

126 See under III.C., *infra*.

127 For a discussion, see de Hart, "The Marriage of Convenience in European Immigration Law" (2006) 8 *Eur. J. Migration & L.*, 251-262 and the country-specific contributions in that issue.

128 See also recital 28 in the preamble to the Directive: "To guard against abuse of rights or fraud, *notably* marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures" (emphasis added). Reference should also be made to Article 13(2) of the Directive, which states that in case of divorce, annulment of marriage or termination of registered partnership, non-EU family members will retain their right of residence on condition that "the marriage or registered partnership has lasted at least three years, including one year in the host Member State". It is clear from the initial Commission proposal that this provision was inserted "in order to avoid people using marriages of convenience to get round the residence entitlement rules" (see Commission proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, [2001] O.J. C270E/150, Article 13(2)).

129 ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607, paras 57-58.

130 For instance, had the marriages in the *Metock and Others* case been proven to be marriages of convenience, Ireland would not have been obliged under Directive 2004/38 to grant residence rights to the non-EU spouses concerned. The Irish High Court deemed, however, that none of

Detailed guidance on the application of Article 35 of Directive 2004/38 can be found in the Commission guidance on the transposition and application of Directive 2004/38.[131] A marriage of convenience is defined as a marriage that is "contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise".[132] The Commission explains that the Directive allows Member States to investigate individual cases where there is a well-founded suspicion of abuse, but that it prohibits systematic checks. At the same time, it is pointed out that measures taken by Member States to fight against marriages of convenience may not be "such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights" and must not "undermine the effectiveness of [Union] law or discriminate on grounds of nationality".

ii) Consequences

The conclusion from the foregoing discussion should be that Union law allows Member States to restrict the residence rights of non-EU family members of a moving Union citizen, but only insofar as this is justified on grounds of public policy, public security or public health or in order to tackle abuse or fraud. As should be clear from the discussion above, this leaves Member States only limited scope to apply their immigration laws vis-à-vis these individuals. It is clear that even a pure and blatant infringement of national immigration laws is not a ground for refusing a right of residence to family members of Union citizens.[133] Such a refusal will only be acceptable where it is justified on the grounds just mentioned. These derogations to the free movement provisions are to be interpreted restrictively, moreover, and have to be applied in accordance with demanding procedural safeguards and with fundamental rights standards. Directive 2004/38, in fact, has the explicit aim of tightening the conditions under which these exceptions can be invoked, as compared with earlier free movement directives.[134] Furthermore, the fact that an individual

---

the marriages concerned was a marriage of convenience (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 46).

131 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final. Detailed guidance can also be found in the earlier Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, [1997] O.J. C382/1.

132 The same definition can be applied *mutatis mutandis* to other relationships. See in this connection also Article 16(2)(b) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12. That Directive contains, in its Article 16, a more detailed regime for dealing with abuses. See, on the difference in this regard between Directive 2003/86 and 2004/38, de Hart, "The Marriage of Convenience in European Immigration Law" (2006) 8 *Eur. J. Migration & L.*, 257.

133 This is confirmed by the Court in cases such as *Ruiz Zambrano* or *Carpenter*.

134 See recital 22 in the preamble to Directive 2004/38: "The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public

assessment of each case needs to take place makes it impossible for Member States to adopt general measures to limit the immigration of non-EU family members of Union citizens. General policy considerations such as the need to reduce immigration will not be a valid ground that can be relied upon in this connection.[135]

There appears to be a big concern on part of the Member States that an excessive or improper use of the provisions on free movement of Union citizens and their family members will reduce their capacity to effectively pursue a coherent immigration policy. Such is clear from the reaction of the Member States in the Council after the *Metock and Others* judgment. After discussion of that judgment in the Council, the Council issued conclusions in which it stressed the need to prevent and combat any misuses and abuses of the free movement provisions.[136] Similarly, the Council has, more recently, issued conclusions in which it welcomed the Commission's guidance on the transposition and application of Directive 2004/38, but at the same time repeated in a very clear and explicit wording the need to tackle cases of fraud and abuse.[137] The need to prevent and avoid abuse and fraud also figures prominently in the *Stockholm Programme*.[138] In this context, the European Council has called on the Commission to closely monitor the implementation and application of the free movement provisions to avoid abuse and to cooperate with the Member States to effectively address abuses, *inter alia* by exchanging relevant information and statistics.

The call for an effective application of Articles 27 and 35 of Directive 2004/38 can be welcomed in the context of a Citizens' Europe. Indeed, in cases where the conditions of application of those Articles are satisfied, over-arching interests are at stake, which justify restrictions being imposed on the exercise of free movement rights. It is important that these derogations are cogently and coherently applied in order to deny the benefit of the free movement provisions to those who have no legitimate claim to them. At the same time, there is a real concern that Member States, reluctant to accept the full consequences of the provisions on the free movement of Union citizens for their immigration policies, will make an overly broad use of the grounds for derogations just mentioned, going beyond the scope of application of these derogations, properly construed. Telling in this connection are the conclusions of the 2008 Commission report on the application of Directive 2004/38. The report concluded that the overall transposition of the Directive was rather disappointing, particularly as regards the rights of entry and residence of family members and the

---

health [(OJ, English Special Edition 1963-1964, p. 117), as amended by Council Directive 75/35/EEC of 17 December 1974 (OJ 1975 L 14, p. 14)]".

135 See in this connection, Article 27(2) of Directive 2004/38, which states that "Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted".

136 Council conclusions of 27 and 28 November 2008 on abuses and misuses of the right to free movement of persons.

137 Council Conclusions of 21 September 2009 concerning the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. For a very critical analysis of an earlier – and more radical – draft of these conclusions, see Peers, "The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms" (2008) *Statewatch Analysis*, available at www.statewatch.org/analyses/no-72-eu-attack-on-fundamental-rights-08.pdf.

138 See: "The Stockholm Programme — An open and secure Europe serving and protecting citizens", [2010] O.J. C115/1.

provisions of Chapter VI.[139] This may point at a reluctance on part of the Member States to accept the full consequences of the free movement provisions. The Commission has announced that it will step up its efforts to ensure that Directive 2004/38 is correctly implemented and applied, by cooperating with and offering assistance to the Member States,[140] but also by launching infringement procedures.[141] It is to be hoped that the Commission's efforts will lead to guaranteeing an effective application of the free movement provisions and prevent an overly broad use of the exceptions thereto.

C. Conclusion

Since the judgment in *Metock and Others* it has become crystal-clear that it suffices for a Union citizen to move to another Member State in order to derive from Union law a right to be joined or accompanied by his close family members. It is not required that the family members concerned have resided legally in another Member State before moving to the host Member State nor is it required that the family relationship was established before either the Union citizen or his family members moved to the host Member State. Consequently, Union law should govern the first entry of non-EU family members of Union citizens to the territory of the Union. This broad interpretation of the scope of the free movement provisions is justified by the need for the Union to tackle obstacles to the exercise of the fundamental right to free movement and residence. Moreover, a broad interpretation of the free movement provisions in this context is supported by important fundamental rights considerations and has the benefit of creating more uniformity in the rules relating to family reunification concerning Union citizens and third country nationals.

At the same time, it is clear that this broad interpretation of the scope of the free movement provisions has a considerable impact on the immigration policies of the Member States. Member States can no longer apply their immigration laws to family members of a Union citizen residing in their territory. This restriction of the Member States' powers regarding immigration seems to be a necessary corollary of the free movement of Union citizens. Nevertheless, it should be stressed that the broad interpretation far from extinguishes the possibility for the Member States to pursue an effective immigration policy. First of all, its consequences are limited *ratione personae* in that only affects certain categories of family members and only to the extent that the conditions of Directive 2004/38 are fulfilled. Moreover, Member States are still allowed to restrict the free movement rights of family members of a

---

139 Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final.

140 The 2009 guidance was given by the Commission precisely in order to give assistance and information to the Member States and Union citizens, in particular in relation to the problems identified in the report (Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final).

141 See the Report cited in n. 140, under "5" and the Sixth Report from the European Commission of 27 October 2010 on progress towards effective EU Citizenship 2007-2010, COM(2010) 602 final.

Union citizen on grounds or public policy, public security or public health or in case of abuse,[142] although these grounds have to be interpreted rather restrictively.

It can be concluded that the ECJ in *Metock and Others* succeeded at striking a delicate balance between the legitimate interests of the Member States in safeguarding effective immigration control and preserving the *effet utile* of the Union provisions on the free movement of persons.[143] While Member States generally retain the possibility of subjecting the first entry of third-country nationals to individual assessment, they may not craft their immigration laws in general terms that are detrimental to the rights of Union citizens, by denying them the right to lawfully reside with their non-EU family members. One could conclude that immigration is firmly added to the fields in which Member State have to exercise their competence in accordance with the provisions on the free movement of Union citizens.[144] As such, the broad scope of the free movement provisions inevitably leads to more harmonized national immigration laws, which is desirable in the light of the Union objective of approximation of national legislations on the conditions for admission and residence of third-country nationals.[145]

The impact of the provisions on the free movement of Union citizens and their family members, especially after the broad interpretation given in recent case law, is a sensitive issue for many of the Member States, as is clear from the reactions from certain Member State officials and from the Council in the aftermath of the *Metock and Others* judgment. This should not surprise as questions of admission of people to the national territory are always very close to questions of sovereignty.[146] Moreover, family reunification in many European countries is the most important form of migration both in terms of numbers and in terms of its impact on the receiving society.[147] There is a real concern that certain Member States will try to escape the full consequences of the free movement of Union citizens and their family members by making an overly broad use of the permissible derogations to the free movement provisions. In this connection, the Union institutions have an important role to play to ensure the effective implementation and application of the free movement provisions, both through cooperation with the Member States and through rigid enforcement.

---

142 Besides, the Member States can still surround breaches of their immigration laws with sanctions that do not restrict free movement rights. As the ECJ held in *Metock and Others*: "even if the personal conduct of the person concerned does not justify the adoption of measures of public policy or public security within the meaning of Article 27 of Directive 2004/38, the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided that they are proportionate" (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 97 (referring to ECJ, Case C-459/99 *MRAX* [2002] E.C.R. I-6591, para. 77)).

143 In this sense also Lansbergen, "Metock, Implementation of the Citizens' Rights Directive and Lessons for EU Citizenship" (2009) 31 *Journal of Social Welfare and Family Law*, 285-297.

144 A parallel could be drawn in this regard with, *inter alia*, the field of direct taxation. See, *inter alia*, ECJ, Case C-520/04 *Turpeinen* [2006] E.C.R. I-10685, para. 11.

145 See Conclusions of the European Council held in Tampere on 15 and 16 October 15 1999 (1999), 10 EU.Bull point 1.6.1., para. 20.

146 X., "Editorial comments: The EU as an Area of Freedom, Security and Justice: Implementing the Stockholm program" (2010) 47 *CML Rev.*, 1307-1316.

147 Groenendijk, "Family Reunification as a Right under Community Law" (2006) 8 *Eur. J. Migration & L.,* 215.

III IS MOVEMENT REQUIRED AT ALL?

A. Traditional approach

1. Link with Union law

The traditional orthodox approach to the applicability of the provisions on Union citizenship, in particular those relating to the free movement of Union citizens, is grounded in the Court's longstanding approach to the applicability of the provisions on the free movement of economically active persons. The Court has consistently held that the free movement provisions "cannot be applied to activities which have no factor linking them with any of the situations governed by [Union] law and which are confined in all relevant respects within a single Member State".[148] It follows that, according to the traditional approach, these provisions can only apply to situations presenting a link with Union law and this link is interpreted, moreover, as a link with two or more specific Member States.[149] Those provisions are not applicable, by contrast, to situations of which all relevant elements are linked to one Member State only. After the introduction of the provisions on Union citizenship, the Court firmly stated that this case law remained valid and that the provisions on Union citizenship as such did not provide a sufficient link with Union law.[150] It followed that Union citizens could only rely on the free movement provisions if their situation presented a link with two or more specific Member States. Consequently, only under those circumstances could family members of a Union citizen claim residence rights based on Union law. It is only with recent case law discussed under B that the Court seems to have abandoned its orthodox approach to some extent (see under III.B., *infra*).

A link with two or more specific Member States is most commonly provided by the fact that a Union citizen has exercised his right to free movement by moving from his home Member State to another Member State and has taken up residence in the latter Member State. Accordingly, the Union citizen concerned is entitled to claim in that Member State the rights conferred by Union law on Union citizens and their family members. Once the right to free movement is exercised, a Union citizen may also rely on Union free movement law against his home Member State. It is settled case law that Article 21 TFEU precludes a Member State from treating its nationals less favourably for the sole reason that they have exercised their free movement rights.[151]

---

148 See*, e.g.*, ECJ, Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] E.C.R. 3723, para. 16; ECJ, Case C-153/91 *Petit* [1992] E.C.R. I-4973, para. 8; ECJ, Case C-18/95 *Terhoeve* [1999] E.C.R. I-345, para. 26; ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 33.

149 The underlying justifications of this orthodox approach will be discussed below (see under III.A.3., *infra*).

150 See ECJ, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171, para. 23: "In that regard, it must be noted that citizenship of the Union […] is not intended to extend the scope *ratione materiae* of the [Treaties] also to internal situations which have no link with [Union] law […]".

151 See, *e.g.*, ECJ, Case C-192/05 *Tas-Hagen and Tas* [2006] E.C.R. I-10451, para. 31. For a discussion of that case law, see Van Nuffel and Cambien, "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren" (2009) 57 *SEW*, 144-154.

Furthermore, in the famous *Singh* case,[152] the Court held that a migrant worker who was lawfully residing with his spouse in the host Member State was entitled, upon his return to his home Member State, to be joined in that State by his spouse. According to the Court, the spouse of a migrant worker in such a situation "must enjoy at least the same rights of entry and residence as would be granted to him or her under [Union] law if his or her spouse chose to enter and reside in another Member State".[153] *Singh* was concerned with the free movement of workers, but the same reasoning should probably apply more broadly to the free movement of Union citizens and their family members, irrespective of their economic activity. Such is arguably confirmed by the *Eind* judgment, in which the Court seems to have applied the reasoning followed in *Singh* analogously to the situation of a Union citizen who was no longer economically active.[154]

However, even before the recent case law discussed under III.B., the Court appeared to accept that a Union citizen must not necessarily move between two Member States in order to provide for a sufficient link with Union law. In a number of cases, the Court accepted that Union citizens fell within the scope of Union law, despite the fact that they had never left their Member State of residence. In *Garcia Avello* and *Zhu and Chen*, the Court appeared to accept that the fact that the Union citizens concerned possessed the nationality of a Member State other than their Member State of residence provided a sufficient link with Union law.[155] In one case, the Court even considered that Union law was applicable where the spouse of a Union citizen had exercised her free movement rights, unlike that Union citizen himself.[156] All the same, it should be clear that in the cases just mentioned a clear link was present with two different Member States. Precisely this link was relied on by the Court in order to consider the situation as falling within the scope of Union law.[157]

The bottom-line is that the Court was traditionally willing to apply the provisions on the free movement of Union citizens only in situations that presented a sufficient "cross-border" dimension or "inter-State" element, *i.e.* a link with at least two specific Member States, even a tenuous one. Once such a link was present, a Union citizen could rely on the full spectrum of rights conferred on him and his family members. In the absence thereof, the Court considered the situation to be a purely internal one, to

---

152 ECJ, Case C-370/90 *Singh* [1992] E.C.R. I-4265, with case notes by White in (1993) *E.L. Rev.*, 527-532 and Fierstra in (1994) *SEW*, 198-202. For a critical discussion of the case, see Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15 *E.L.J.,* 634-653.

153 ECJ, Case C-370/90 *Singh* [1992] E.C.R. I-4265, para. 23.

154 See Bierbach, "European Citizens' Third-Country Family Members and Community Law" (2008) 4 *EuConst*, 356.

155 See ECJ, Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, para. 27 (Union citizens possessing the nationality of the Member State of residence and that of another Member State); ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 19 (Union citizen possessing the nationality of another Member State than that of residence). However, the Court clarified in its recent *McCarthy* judgment (ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr.) that this commonly accepted interpretation of at least the *Garcia Avello* judgment is wrong and that the possession of the nationality of another Member State was not a crucial element for the outcome of that case. See the detailed discussion under III.B.1.c., *infra*

156 ECJ, Case C-403/03 *Schempp* [2005] E.C.R. I-6421, paras 22-25.

157 However, judgments like *Garcia Avello* can, under the new approach followed in the recent case law discussed below, be satisfactorily held to fall within the scope of Union law without it being necessary to rely on a link with two specific Member States.

which the Union law did not apply. This approach is sometimes referred to as the "purely internal rule" or the "wholly internal rule". Only very recently, the case law has changed on this point to some extent (see the discussion under III.B., *infra*).

For the sake of completeness, it must be pointed out, however, that there are provisions of Union law conferring rights on Union citizens whose application is not in any event dependent on the presence of an inter-State element. The most famous example in this regard is no doubt Article 157 TFEU [*ex Article 141 EC*], which lays down the principle of equal pay for male and female workers.[158] Similarly, some of the core citizenship rights can be exercised in one's own Member State, regardless of any link to another Member State. This is true, in particular, for the right to petition the European Parliament in accordance with Article 227 TFEU, the right to apply to the Ombudsman in accordance with Article 228 TFEU or the right to write to any of the institutions or bodies of the Union in an official language and have an answer in the same language (see Article 24 TFEU). The right to diplomatic or consular protection under Article 23 TFEU, for its part, can only be exercised in a third country and does also not require a link to be demonstrated with two or more Member States. All the same, the rights I am concerned with here, namely the rights enjoyed by family members of Union citizens have traditionally been seen as a corollary of free movement and have been considered by the Court to apply only in situations presenting a sufficient inter-State element.

2. Reverse discrimination

One consequence of the orthodox approach is that only Union citizens whose situation is characterized by a sufficient inter-State element enjoy the rights conferred by Union law on Union citizens and their family members. Conversely, Union citizens who find themselves in a purely internal situation, because their situation does not present a link with two or more specific Member States, cannot rely on these rights.[159] This is clearly illustrated by the *Morson and Jhanjan* case,[160] in which the ECJ held that two Dutch nationals working in the Netherlands had no right under Union law to bring their parents, of Surinamese nationality, into the country to reside with them. As nationals working in their own Member State "who had never exercised the freedom of movement within the Union",[161] their situation was to be regarded as purely internal.[162] This case was obviously decided before the introduction of Union citizenship, but its *rationale* remained valid afterwards.

---

158 This provision applies even if all relevant elements are situated within one Member State, as has been confirmed by the Court (see ECJ, Case 149/77 *Defrenne* [1978] E.C.R. 1365).

159 See Craig and De Búrca *EU law. Text, Cases, and Materials* (4th ed.) (Oxford, Oxford University Press, 2007), 782-783.

160 See ECJ, Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] E.C.R. 3723.

161 *Ibid.*, para. 17.

162 The situation in these cases should be contrasted with the one at hand in ECJ, Case C-370/90 *Singh* [1992] E.C.R. I-4265. In that case, an Indian national had married a British national and travelled with her to Germany, where they had both worked for some years before returning to the UK. It was decided that Mr. Singh could claim the right under Union law to join his spouse in the UK because, through the period of working activity in another Member State, the Union legislation on the free movement of persons had become applicable.

Consequently, the orthodox approach followed in the case law can give rise to instances of "reverse discrimination", *i.e.* Union citizens who find themselves in a purely internal situation being treated less favourably than Union citizens who can demonstrate a sufficient link with Union law.[163] The reason is that Union citizens in a purely internal situation cannot rely on the rights conferred by Union free movement law, but only on the possibly less favourable rights conferred by the national law of their Member State of residence. Instances of reverse discrimination do not infringe the Union principle of non-discrimination because the latter is not applicable to purely internal situations. However, it must be emphasized that, with regard to the issue of rights enjoyed by family members of Union citizens, the scope for reverse discrimination is limited by reason of Article 8 ECHR.[164]

3. Outline

The purely internal rule has given rise to significant controversies and to passionate debates and fierce criticism in legal literature. Even Advocates General have entered the debate, expressing different views on the issue and openly disagreeing with each other.[165] Before discussing the possible and desirable evolution of the case law on this point, it is important to briefly outline the reasons for the current position of the Court and the main reasons why it may be problematic. This will provide me with an appropriate framework for my analysis below.

The fundamental reason for the existence of the purely internal rule lies rather obviously in the division of competences between the Union and the Member States. Union law has a limited scope of application and cannot be relied on, therefore, in situations that fall outside this scope. On this fundamental level, the purely internal rule cannot, in my view, be questioned with good reason. Reversing this rule, by

---

163 Different authors have given different definitions of the concept. The definition given here is one which suits the remainder of my analysis. It confirms to the view that seems to be most generally accepted among scholars. For a more nuanced and critical analysis of the doctrine, see, *inter alia*, Tryfonidou *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International, 2009), 271 pp.; Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe" (2008) 35 *LIEI*, 43-67; Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, 731-771; Papadopoulou, "Situations purement internes et droit communautaire: un instrument jurisprudentiel à double fonction ou une arme à double tranchant?" (2002) *C.D.E.*, 95-129; Poiares Maduro, "The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations", in Kilpatrick, Novitz and Skidmore (eds.), *The Future of Remedies in Europe* (Oxford and Portland, Hart Publishing, 2000), 117-140; Cannizzaro, "Producing 'Reverse Discrimination' through the Exercise of EC Competences" (1997) *YbEL* 29-46 and, more specifically with regard to rights enjoyed by family members of Union citizens, Walter, *Reverse Discrimination and Family Reunification* (Nijmegen, Wolf Legal Publishers, 2008), 78 pp; Goldner, "Family Reunification of European Community Nationals" (2005) *Croatian Yearbook of European Law & Policy*, 163-202; Groenendijk, "Familienzusammenführung als Recht nach Gemeinschaft srecht", (2006) 26 *Zeitschrift für Ausländerrecht und Ausländerpolitik,* 191-198. See the helpful overview of literature on the subject in Hanf, "'Reverse Discrimination in EU Law': Constitutional Aberration, Constitutional Necessity, or Judicial Choice?", (2011) 18 *MJ,* 29-61.

164 See ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 79.

165 Compare Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 91 to 97 and 122 and Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] E.C.R. nyr, para. 31.

allowing Union law to be applied in situations that present no link with Union law, would upset the entire Union construct and would belie some of its most basic principles, such as the principle of conferral. The real contentious question, however, is where the line between the scope of Union law and that of national law should be drawn. In other words: what should be considered a sufficient link with Union law in order for a situation to fall within the scope of Union law and when, conversely, should a situation be considered to be a purely internal one? On this level, the orthodox approach, requiring an "inter-State" element can with more reason be criticised.

Two main objections have been voiced against the traditional approach of the Court to the application of the free movement provisions. In the first place, it is sometimes argued that it is incompatible with the concept of the internal market as an "area without internal frontiers"[166] because in a true internal market the crossing of a border between Member States should not be a relevant distinguishing factor for the application of Union law.[167] More broadly, the orthodox approach can be said to be contrary, for the same reason, to the idea of the Union as an "area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured".[168] In the second place, and more importantly for the purposes of my analysis, the current approach is sometimes said to be at odds with the provisions on Union citizenship.[169] In this connection it is argued that the distinction drawn in the case law between Union citizens who can demonstrate an even tenuous inter-State element and those who cannot is arbitrary and that Union citizenship should, as the most fundamental status of nationals of the Member States[170] embody a guarantee to equal treatment of Union citizens regardless of any further link with Union law. Accordingly, in the most extreme version of this argument, all instances of reverse discrimination of Union citizens should be held to violate Union law, the provisions on Union citizenship and equal treatment in particular.

In order to remedy the problems stated, generally speaking, two solutions can be envisaged. On the one hand, it can be argued that Union law should have a wider scope of application and that it should also apply vis-à-vis Union citizens who cannot demonstrate an inter-State element. This could be achieved mainly by interpreting the status of Union citizen, or some of the rights associated with this status, as a sufficient link with Union law even in situations in which no further inter-State element is present. On the other hand, it could be argued that the scope of Union law should be

166 See Article 26(2) TFEU.

167 This idea was cogently put forward, *inter alia*, by Jessurun d'Oliveira: Jessurun d'Oliveira, "Is Reverse Discrimination Still Permissible Under the Single European Act?", in De Boer (ed.), *Forty Years On: The Evolution of Postwar Private International Law in Europe* (Deventer, Kluwer, 1990), 71-86. See also Opinion of AG Mischo in Joined Case 80/85 and 159/85 *Edah* [1986] E.C.R. 3359.

168 See Article 3(2) TEU.

169 See the discussion *infra* and, *inter alia*, Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe" (2008) 35 *LIEI*, 43-67; Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, 731-771. See also Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 *CML Rev.*, 13-45 and Jacobs, "Citizenship of the European Union - A Legal Analysis" (2007) 13 *E.L.J.*, 591-610.

170 Settled case law of the ECJ. See, *e.g.*, ECJ, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. 31; ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 82; ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 43.

more limited and that the Union free movement provisions should only be applicable to Union citizens who, besides demonstrating an inter-State element, demonstrate a sufficient obstacle to the exercise of free movement rights. This would, arguably, result in a less arbitrary distinction between Union citizens who can invoke Union law and those who cannot.

In the following, I will first discuss new proposals for determining the scope of application of the Union citizenship provisions which were advanced in recent case law (B). These proposals contain different solutions for remedying the problems associated with the purely internal rule and all go in the direction of widening the scope of Union law. Next, I will evaluate the different proposals in light of their legal soundness and their possible consequences and consider the most plausible and most appropriate future directions for the case law of the Union courts. Consequently, I will put forward some arguments which go to some extent in the direction of a restriction of the scope of Union law (C). I will then formulate an answer to the question raised above, namely does movement still matter for the applicability of Union law, and should it (D)?

It is not my intention to exhaustively analyse or even set out the existing case law on the purely internal rule or to elaborate an all-encompassing new analytical framework for the scope of application of Union law. Instead I will concentrate on cases involving Union citizenship and, more in particular, on the rights enjoyed by Union citizens relating to family reunification. The question I will try to answer then becomes whether movement between Member States is or should be a relevant element to determine the rights enjoyed by family members of Union citizens. Consequently, I will not be concerned with cases involving the free movement of goods, in which reverse discrimination can also be a contentious issue,[171] nor with arguments relating to the internal market or with arguments relating to the consistency in the application of Union law governing the different freedoms.[172] My analysis is more limited in scope and could only be a basis for a more encompassing theory regarding the scope of application of Union law. That being said, due attention will be paid to the legal soundness and consistency of the approach advocated in light of the general framework of Union law.

B. Future evolution: widening the scope of Union law?

In this section, I discuss new approaches to the determination of the scope of Union law which surfaced recently in the case law of the ECJ and in Opinions by Advocates General. As stated higher, I will concentrate on cases concerning the rights enjoyed by family members of Union citizens. I will first discuss the proposals done by AG Sharpston in her Opinions in the *Flemish Care Insurance Scheme* case and the *Ruiz Zambrano* case and the approach followed by the Court in *Ruiz Zambrano* and *McCarthy*. Next, I will evaluate the soundness of these different approaches and their likely consequences.

---

171 See, for instance, Ritter, "Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234 " (2006) 31 *E.L. Rev.*, 690-710.

172 See, on that issue, *inter alia*, the very interesting Opinion of AG Poiares Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos* [2006] E.C.R. I-8135.

1. Proposals in case law

a) Proposals AG Sharpston

One of the most prominent advocates of a wider interpretation of the scope of the Union free movement provisions is AG Sharpston. In two famous opinions, the AG has proposed to give a wider interpretation of the required link with Union law, which would enable the Court to apply Union law in situations not characterized by any inter-State element and thus falling outside the scope of Union law according to the orthodox approach outlined above. To this purpose, she has relied essentially on the provisions of Union citizenship and the right to equal treatment enjoyed by Union citizens. AG Sharpston did so for the first time in her Opinion in the *Flemish Care Insurance* case, which I will only briefly discuss below, because it involves an issue different from the main issue of my analysis. She took up and further elaborated the ideas of that Opinion in a more recent Opinion, namely in the *Ruiz Zambrano* case. That case concerned exactly the subject I am concerned with here, namely the rights of non-EU family members of Union citizens, and will therefore be discussed in some detail below.

As a preliminary remark, it should be emphasized that AG Sharpston is neither the first nor the only Advocate General who has defended the view that the provisions on Union citizenship could provide a sufficient link with Union law or that Union law should be held to preclude (to some extent) reverse discrimination of Union citizens.[173] Already in 1995, AG Léger took the view that, taken to its ultimate conclusion, the concept of Union citizenship should lead to Union citizens being treated absolutely equally, irrespective of their nationality.[174] AG Poiares Maduro, for his part, has expressed the view that "it is now clearly one of the fundamental objectives of the [Union] to ensure that no discrimination of any kind should arise as a result of the application of its own rules".[175] In *Huber*, AG Poiares Maduro added that "[t]he prohibition of discrimination on the basis of nationality is no longer merely an instrument at the service of freedom of movement; it is at the heart of the concept of European citizenship".[176] However, to my knowledge such statements have always appeared in a specific context or in an embryonic form rather than being fully elaborated into a coherent framework of analysis. For that reason, I will concentrate on the Opinions of AG Sharpston, which do set out an elaborate analytical framework on this point.

i) *Flemish Care Insurance case*

---

173 It has been noted in fact, with regard to early citizenship cases, that Advocates General have taken a much more inventive and transformative approach to Union citizenship than the Court (see Toner, "Judicial Interpretation of European Union Citizenship - Consolidation or Transformation" (2000) 7 *MJ*, 174). This trend seems to continue to some extent in recent years.

174 Opinion of AG Léger in Case C-214/94 *Boukhalfa* [1996] E.C.R. I-2253, para. 63.

175 Opinion of AG Poiares Maduro in Case C-72/03 *Carbonati Apuani* [2004] E.C.R. I-8027, para. 63.

176 Opinion of AG Poiares Maduro in Case C-524/06 *Huber* [2008] E.C.R. I-9705, para. 18.

The case concerned the Flemish Decree on the organisation of care insurance, which stipulated that it covered only persons working in the Flanders or Brussels region and residing in those regions or in another Member State.[177] As a consequence, persons working in those regions, but residing in the French- or German-speaking region of Belgium were excluded from its scope. Moreover, no comparable system of care insurance was in place in the French- or German-speaking region to which these persons could have recourse. An action was brought before the Belgian Constitutional Court in which it was alleged, *inter alia*, that the residence requirement contained in the Decree violated the Union free movement provisions.

In its judgment,[178] the ECJ considered that the contested residence requirement unjustifiably restricted the free movement of persons. However, the Court considered this to be the case only vis-à-vis nationals of other Member States or Belgian nationals who had made use of their right to free movement. The residence requirement was not, by contrast, contrary to Union law when applied vis-à-vis Belgian nationals who had never made use of their right to free movement because they fell outside the scope of Union law. At the same time, the Court suggested, in an oft-cited paragraph, that the Belgian Constitutional Court could apply to purely internal situations a similar approach as the one applicable to situations falling within the scope of Union law.[179] The Belgian Constitutional Court did not, however, take up this suggestion and declared the residence requirement invalid only to the extent that it was applicable to non-Belgian Member State nationals and to Belgian nationals who had made use of their right to free movement.[180]

---

177 Decreet houdende de organisatie van de zorgverzekering of 30 March 1999 (*Moniteur belge* of 28 May 1999, 19149) as modified by Decreet houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering of 30 april 2004 (*Moniteur belge* of 9 June 2004, 43593). Before the 2004 modification, the Decree stipulated that only persons residing in Flanders or Brussels were covered.

178 ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, with case notes by Dautricourt in (2008) *R.D.U.E.*, 603-611; Martin in (2008) *Eur. J. Migration & L.*, 365-379; Van der Steen in (2008) *N.T.E.R.*, 301-307; Vandamme in (2009) *CML Rev.*, 287-300. For a detailed discussion of the judgment and its consequences for the organisation of the Belgian social security systems, see Verschueren, "De regionalisering van de sociale zekerheid in België in het licht van het arrest van het Europese Hof van Justitie inzake de Vlaamse zorgverzekering" (2008) *Belgisch Tijdschrift voor Sociale Zekerheid*, 177-231 and Verschueren, "Social Federalism and EU Law on the Free Movement of Persons", in Cantillon, Popelier and Mussche (eds.), *Social Federalism: The Creation of a Layered Welfare State. The Belgian case* (Antwerp-Oxford-Portland, Intersentia, 2011), 197-226.

179 ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 40 ("It may nevertheless be remarked that interpretation of provisions of [Union] law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from [Union] law in a situation considered to be comparable by that court").

180 Constitutional Court, Judgment 11/2009 of 21 January 2009, with a case note by Van Elsuwege and Adam in (2009) 5 *EuConst,* 327-339. The judgment of the Belgian Constitutional Court was too a large extent based on considerations concerning the division of competences *ratione loci* within the Belgian Legal order (see on that issue, Velaers and Vanpraet, "De materiële en territoriale bevoegdheidsverdeling inzake sociale zekerheid en sociale bijstand (II)" (2009) *TBP*, 195-218).

The Court did not follow the Opinion of AG Sharpston, in which she proposed that Union law should also be applied in the case of Belgian nationals working in Flanders or Brussels who had never made use of their free movement rights.[181] The AG observed that the organization of the Flemish care insurance created a sort of internal barrier in the sense that only (non-moving) Belgians living in certain regions of Belgium were entitled to the care insurance scheme. She remarked in this connection:

> "I must confess to finding something deeply paradoxical about the proposition that, although the last 50 years have been spent abolishing barriers to freedom of movement *between* Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them *within* Member States."[182]

The AG proposed to apply Union fee movement law also where the exercise of free movement rights was hindered by internal barriers resulting from the adoption of differing rules adopted by decentralized authorities within a Member State. In this connection she pointed out, first, that the Court has been willing to apply the provisions on the free movement of goods to internal tariff barriers affecting free movement of goods.[183] This case law, based *inter alia* on the idea that internal barriers are not compatible with the internal market, could according to the AG be applied by analogy to the free movement of persons. The AG found further support for her view in the provisions on Union citizenship. She suggested that Article 21 TFEU could possibly be interpreted as conferring not only a right to move and *then* reside, but also a right to reside without prior movement between Member States. That interpretation would make it possible for "static" Union citizens to invoke the principle of non-discrimination in their own Member State against a decentralised authority that "unquestionably exercises the *auctoritas* of the State".[184]

It should be clear that the suggestions of AG Sharpston in her Opinion in the *Flemish Care Insurance* case would be of interest first and foremost in situations where an internal barrier is created by the different rules adopted by autonomous decentralized authorities.[185] The Court's refusal to follow the suggestions of the AG probably rests on considerations related to the need to respect the division of competences between the Union and the Member States and on the consideration that Union law should not intervene in the internal division of competences within a Member State.[186]

---

181 See Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, paras 112-157. The AG added, however, that the ECJ would probably not wish to decide such a fundamental point in the case at hand and certainly not without reopening the oral procedure and inviting Member States to make their views on the issue known (*ibid.*, para. 157).

182 Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 116.

183 ECJ, Case C-163/90 *Legros* [1992] E.C.R. I-4625; ECJ, Joined Cases C-363/93, C-407/93 to C-411/93 *Lancry* [1994] ECR I-3957; ECJ, Joined Cases C-485/93 and C-486/93 *Simitzi* [1995] E.C.R. I-2655; ECJ, Case C-72/03 *Carbonati Apuani* [2004] E.C.R. I-8027.

184 Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, paras 133-157. The AG specified that discriminations against certain categories of "static" Belgians could possibly be justified (*ibid.,* para. 155).

185 This situation could arise in federal Member States like Austria, Belgium or Germany, but also in other Member States with powerful regional entities such as, for instance, Italy or Spain.

186 In fact, even the judgment of the Court, which takes a less radical line than the AG, has been criticized for unjustifiably interfering with the internal division of powers. See, amongst others,

Nevertheless, as I have argued elsewhere,[187] there may be good reasons to apply Union law where the exercise of free movement rights is hindered by internal barriers in a Member State enacted by decentralized authorities with legislative powers. As has been remarked, the Court has been willing to treat autonomous decentralized entities of a Member State as Member States for the purposes of the application of Union rules in other contexts.[188] It could be argued that it should be willing to do so when applying the provisions on the free movement of Union citizens.[189] I will not elaborate that point here, since the primary focus of my analysis is the scope of the residence rights enjoyed by family members of Union citizens and since the internal conferral of competences to autonomous entities within a Member State and the influence of Union law thereon will not normally be relevant for that issue.[190] I will also not analyse in detail the part of the AG's reasoning based on considerations relating to the internal market, as I am primarily focusing on the rights of family members of non-economically active Union citizens.[191]

By contrast, the part of the reasoning of the AG grounded in Union citizenship is highly relevant for my analysis. The idea that the provisions on Union citizenship in

---

Cloots, "Germs of Pluralist Judicial Adjudication: *Advocaten voor de Wereld* and Other References from the Belgian Constitutional Court " (2010) *CML Rev.*, 661-664; Verschueren, "Europese krijtlijnen voor een sociaal federalisme", in Cantillon, Popelier and Mussche (eds.), *Naar een Vlaamse sociale bescherming in België en Europa?* (Antwerp-Oxford, Intersentia, 2010), 243-245.

187 See the detailed discussion in Cambien, "Het vrij verkeer van burgers van de Unie in recente Europese rechtspraak: *rethinking the classics*?", in Foblets, Maes and Vanheule (eds.), *30 jaar Vreemdelingenwet* (Bruges, Die Keure, 2011), 461-503.

188 See the detailed discussion in Lenaerts and Cambien, "Regions and the European Courts: Giving Shape to the Regional Dimension of Member States" (2010) 35 *E.L. Rev.,* 609-635.

189 See Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?" (2009) 34 *E.L. Rev.*, 450-454; Van Elsuwege and Adam, "Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance flamande" (2008) *C.D.E.,* 705-709; Van Elsuwege and Adam, "The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination (Case note: Constitutional Court, Judgment 11/2009 of 21 January 2009)" (2009) 5 *EuConst*, 337-339. This argument is problematic, of course, in the sense that it would reauire the Court to possibly upset the division of competences between the Union and the Member States.

190 Even though, in theory a situation could be imagined in which different autonomous entities of a Member State enacted different rules regarding family reunification, thereby creating internal barriers to the free movement of persons. This hypothetical situation will be left aside for my analysis.

191 In any event, is seems to me that the reliance on cases involving internal barriers to the free movement of goods is rather problematic, as there are relevant differences between (economically active) persons and goods. In this sense, see Martin, "Comments on Gouvernement de la Communauté française and Gouvernement wallon (Case C-212/06 of 1 April 2008) and Eind (Case C-291/05 of 11 December 2007)" (2008) 10 *Eur. J. Migration & L.*, 370-371. See, more in general on the different regime applicable to persons and goods, *e.g.*, Enchelmaier and Oliver, "Free movement of goods: Recent developments in the case law" (2007) 44 *CML Rev.*, 659 *et seq.*; Snell, "And Then There Were Two: Products and Citizens in Community Law", in Tridimas and Nebbia (eds.), *European Union Law for the Twenty-First Century: Volume II* (Oxford and Portland, Hart Publishing, 2004), 49-72 and the discussion in Nic Shuibhne, "The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?", in Barnard and Odudu (eds.), *The Outer Limits of European Union Law* (Oxford and Portland, Hart Publishing, 2009), 167-195. See also Martenczuk, "Visa Policy and EU External Relations", in Martenczuk and van Thiel (eds.), *Justice, Liberty, Security: New Challenges for EU External Relations* (Brussels, VUB Press, 2008), 21 (who explains the problematic nature of parallels drawn between persons and goods in a wholly different context, namely that of the EU's visa policy).

itself could provide a sufficient link with Union law could remedy some of the problems associated with the traditional approach followed in the case law, as I have outlined above. AG Sharpston further elaborated this reasoning in her more recent Opinion in *Ruiz Zambrano*.

ii) *Ruiz Zambrano*

Mr. Ruiz Zambrano was a Colombian national who came to Belgium in 1999, where he was later joined by his Colombian spouse and their first child, who had the Colombian nationality too. His request for asylum was rejected by the Belgian authorities, who ordered him to leave the country. In spite of that order, he remained in Belgium, where he repeatedly and unsuccessfully applied for a residence permit.[192] His applications were rejected because they did not satisfy the requirements of Belgian immigration law. Between October 2001 and October 2006, Mr. Ruiz Zambrano was gainfully employed, in a way compliant with the requirements of the Belgian social security system. He did not, however, hold a work permit. For this reason, his application for unemployment benefits, submitted after he was forced to quit his job,[193] was refused by the Belgian authorities.

The question to be answered by the ECJ was whether Mr. Ruiz Zambrano could derive a right of residence in Belgium from Union law and whether Union law would exempt him from the obligation to hold a work permit.[194] The crucial element in this regard was that, during his stay in Belgium, Mr. Ruiz Zambrano's spouse gave birth to a second and third child, who acquired the Belgian nationality on grounds of their birth in Belgium.[195] Since these children are Union citizens, it was argued that Mr.

---

192 Mr. Ruiz Zambrano sought the annulment of those decisions and, in the meantime, requested the suspension of the order requiring him to leave Belgium. This allowed him to continue to remain in Belgium (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 21).

193 Mr. Ruiz Zambrano was forced to quit his job after the Belgian labour authorities discovered that he was working without a work permit and ordered the termination of his employment (ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 27).

194 It is important to point out that the dispute before the referring Belgian court (the *Tribunal du travail de Bruxelles*) in fact concerned the rejection by the Belgian authorities of Mr. Ruiz Zambrano's claim for unemployment benefits. The outcome of that dispute was, however, completely dependent on the ECJ's ruling on whether Mr. Ruiz Zambrano could derive a right of residence in Belgium from Union law. AG Sharpston pointed out that if Mr. Ruiz Zambrano derived a right of residence from Union law as the family member of a Union citizen (see the discussion below), the requirement to hold a residence permit would no longer apply under Belgian law (see Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 39-40). For this reason perhaps, she did not explicitly consider the validity of the refusal of a work permit under Union law. The Court, by contrast, considered explicitly the validity under Union law of both the refusal to Mr. Ruiz Zambrano of a residence permit and the refusal to him of a work permit.

195 Pursuant to Article 10(1) of the Belgian Nationality Code, in the version applicable at that time, children born in Belgium acquired the Belgian nationality if they would otherwise be stateless. However, since an amendment of that article in 2006, such will only be the case "if, by appropriate administrative action instituted with the diplomatic or consular authorities of the country of nationality of the child's parent(s), the child's legal representative(s) can obtain a different nationality for it" (see Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 16). This amendment was held to be constitutional by the Belgian Constitutional Court, but only when interpreted restrictively in the sense that the new wording only applies if the diplomatic or consular authorities referred to have no margin of discretion to

Ruiz Zambrano was entitled to reside with them in Belgium. To support this point, Mr. Ruiz Zambrano heavily relied on the *Zhu and Chen* case, in which the Court held that a young minor Union citizen was entitled to be accompanied in the host Member State by the parent who is his or her primary carer.[196] The problematic aspect of his argument was, however, that in contrast with baby Chen, the children of Mr. Ruiz Zambrano had never resided in a Member State other than that of their nationality. For that reason, it seemed that the situation of Mr. Ruiz Zambrano was a purely internal one, in which no reliance on Union law was possible. This point of view was defended before the ECJ by no less than eight Member States and by the Commission.

In her Opinion,[197] AG Sharpston, again, invited the Court to depart from its traditional approach to the issue of "purely internal situations". She made two proposals which would allow the Court to apply Union law to the facts of the case in the case, in spite of the *prima facie* absence of any inter-State element.[198] Her first proposal was based on the view that Article 21 TFEU confers a right of residence in the Member States irrespective of any prior movement between Member States. That interpretation would allow static Union citizens, such as the children of Ruiz Zambrano, to invoke the Union free movement provisions. In this connection, the AG drew an explicit parallel with the *Rottmann* judgment, in which the Court held that the withdrawal of nationality, in the circumstances of that case, fell "by reason of its nature and its consequences" within the scope of Union law because it could lead to the loss of Union citizenship and the rights associated therewith. According to the AG, a refusal of a right of residence to Mr. Ruiz Zambrano would similarly entail for his children the loss of one of the most important citizenship rights, namely the right to free movement and residence in the Member States, because they could not exercise this right independently given their young age. On the basis of that reasoning, the situation of Mr. Ruiz Zambrano and his children would fall "by reason of its nature and its consequences" within the scope of Union law and thus reliance by Mr. Ruiz Zambrano on Union free movement law would become possible.[199] Naturally, it

---

register the child and does not apply where it is not possible for the parents to have recourse to those authorities (Case 73/2008 of 24 April 2008). See also the discussion in van der Mei, van den Bogaert and de Groot, "De arresten Ruiz Zambrano en McCarthy - Het Hof van Justitie en het effectieve genot van EU-burgerschapsrechten", (2011) *N.T.E.R.,* 198-199.

196 See the detailed discussion in Chapter 5, *infra*.

197 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr.

198 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 67-122. The AG did a third proposal which would also be apt to cure certain instances of reverse discrimination (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, 151-177). This third proposal was, however, mainly concerned with possible future evolutions of the scope of Union fundamental rights protection and could not yet be followed under the current stance of the law according to the AG. This third proposal is less important for my analysis. For this reason, I will discuss it only briefly below.

199 The AG clarified that even if the interpretation of Article 21 TFEU as conferring an independent right of residence would not be accepted, the refusal of a right of residence to Mr. Ruiz Zambrano would still constitute a potential obstacle to the future exercise by his children of their free movement rights as Union citizens and therefore their situation would still need to be considered to fall "by reason of its nature and its consequences" within the scope of Union law (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 103).

would still be possible then that the refusal of a right of residence to them would be justified by a legitimate aim and be proportionate to that aim.[200]

The AG's second proposal - which would come into play if the Court would not be willing to follow her first proposal - was based on an innovative interpretation of the Union principle of equal treatment, which would be suitable to remedy reverse discrimination. The AG suggested that Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law where three cumulative conditions are satisfied. First, it would have to be the case that a "static" Union citizen was treated less favourably than other Union citizens purely because of the fact that he or she had never exercised his or her free movement rights. Second, the reverse discrimination complained of would have to entail a violation of a fundamental right protected under Union law. The AG added in this connection that what constituted a "violation of a fundamental right" would have to be defined where possible by reference to the case-law of the ECtHR. Third, Article 18 TFEU would be available only as a subsidiary remedy, confined to situations in which national law did not afford adequate fundamental rights protection. It would be the task of the national courts to apply these cumulative criteria.

AG Sharpston was clearly looking for sound legal arguments that would enable the Court to escape the "black hole" of the wholly internal rule and allow it to apply Union law in cases like *Ruiz Zambrano* which lack a clear inter-State element. The AG thereby did not propose to abolish that rule, but merely suggested possible interpretations of Union law which would allow Union citizens to establish a sufficient link with Union law even in situations which were under the traditional case law of the ECJ considered purely internal. Her main concern was clearly that the traditional approach leads to reverse discrimination, which can be characterized as being arbitrary. As was explained above, it is indeed the case that the only element that seemed to prevent Mr. Ruiz Zambrano to rely on the *Zhu and Chen* case law was the fact that his children had never exercised their right to free movement. AG Sharpston called this situation "paradoxical" and expressed a certain sense of "unease" with it.[201] As I will explain in the following, the Court followed a different approach which also enabled it to apply Union law in the circumstances of the case. Below I will analyse the different approaches of AG Sharpston and the Court and discuss whether they enable the Court to take away the current perceived arbitrariness while at the same time striking a proper balance between the effectiveness of free movement rights and the interests of the Member States.

b) Ruiz Zambrano judgment

As was explained higher, the Court has traditionally held that the situation of a Union citizen only comes within the scope of Union law if it presents a certain inter-State element, *i.e.* a link with two or more specific Member States. In its judgment of 2

---

200 AG Sharpston was of the opinion that the Belgian refusal of a right of residence constituted a disproportionate interference, but added that this matter was ultimately to be decided by the national court (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 121).

201 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 84 and 88.

March 2010 in *Rottmann*,[202] however, the Court, arguably for the first time, departed from this approach and was ready to consider a more abstract link with the Union legal order as sufficient in order for a situation to fall within the scope of Union law.[203] In paragraph 42 of that judgment the Court held that a decision of a Member State to withdraw a fraudulently obtained nationality fell "by reason of its nature and its consequences", within the ambit of Union law. The reason was that the decision would likely entail for the person concerned the loss of Union citizenship and the rights associated therewith. The link with Union law lay thus in the fact that the person concerned would lose his most fundamental status under Union law and would no longer be able to exercise the rights associated with that status throughout the Union. As I have explained in Chapter 1, it would be possible to argue, on grounds of that reasoning, that every decision involving Member State nationality that leads to the acquisition, loss or denial of Union citizenship now falls within the scope of Union law.

A similar reasoning was followed by the Court in its judgment in *Ruiz Zambrano*.[204] In a remarkably short judgment, the Court pointed out that the children of Mr. Ruiz Zambrano were undeniably Union citizens and that Union citizenship was, according to settled case law, the fundamental status of nationals of the Member States.[205] Referring to paragraph 42 of the *Rottmann* judgment, the Court stated that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the "genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".[206] The Court held that the refusal of a residence permit and of a work permit to a person in a situation like Mr. Ruiz Zambrano had precisely this effect. The reason was that a refusal of a residence permit would require that person's children to accompany their parents to a third country. Similarly, the refusal of a work permit would entail the risk that that person would not have sufficient resources to provide for himself and his family, which would also result in the children having to leave the territory of the Union. In both circumstances, the children would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as Union citizens.[207] That outcome would be at variance with Article 20 TFEU.

---

202 ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449., with case notes by Cambien in (2011) 17 *Colum. J. Eur. L.,* 375-394 and in (2010) *SEW*, 379-382; De Groot in (2010) *Asiel & Migratierecht,* 293-300; Jessurun d'Oliveira in (2010) *NJB,* 1028-1033; Kochenov in (2010) 47 *CML Rev.,* 1831-1846; Mouton in (2010) *Revue de Droit International Public,* 257-280; Oosterom-Staples in (2010) *N.T.E.R.,* 188-194.

203 I discussed that judgment and its possible consequences in great detail in Chapter 2. One could consider case *Eman and Sevinger* to be an early other example of this new approach towards the scope of Union law (ECJ, Case C-300/04 *Eman and Sevinger* [2006] E.C.R. I-8055). In that case, the Court held the Union principle of equal treatment to be applicable, even though the case did not present any inter-State link. The Court did not explicitly consider why Union law was applicable, but the reason was probably that the case concerned elections to the European Parliament, which provided a sort of abstract link with Union law.

204 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, with Case Notes by Cambien in (2011) *SEW* 410-413, Hailbronner and Thym in (2011) 48 *CML Rev.,* 1253-1270 and Nowak in (2011) *Colum. J. Eur. L.* (forthcoming).

205 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 40-41.

206 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 42. In other paragraphs of the judgment, the Court refers in this connection to the "genuine enjoyment of the substance of the rights attaching to the status of European Union citizen". Both expressions mean presumably the same. Throughout this chapter I will use the expression "citizenship rights".

207 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 43-44.

Consequently, the Court did not take up AG Sharpston's proposal to interpret Article 21 TFEU as conferring a free-standing right of residence or her proposal. It even implicitly rejected it by holding that Directive 2004/38 could not find application.[208] Nor did it follow the AG's proposal to interpret Article 18 TFEU as being applicable to certain instances of reverse discrimination. The Court did not at all, in fact, consider the case from the angle of fundamental rights. By contrast, the Court was clearly very much inspired by the parallel drawn by AG Sharpston with the reasoning followed in *Rottmann*, although it drew this parallel somewhat differently (see the discussion under III.B.4., *infra*). In any event, the Court's readiness to interpret Article 20 TFEU as providing a sufficient link with Union law in the circumstances of the case constitutes a very important evolution in the case law on Union citizenship. This new approach was again adopted by the Court, and further clarified, in its judgment of 5 May 2011 in *McCarthy*.[209]

c) McCarthy judgment

The applicant in the case, Mrs. McCarthy, was a British national who had lived her whole life in the UK. In 2002, she married a Jamaican national, who was not, however, entitled to reside in the UK in accordance with the British immigration rules. Since her mother was born in Ireland, Mrs. McCarthy also possessed the Irish nationality. After her marriage, she applied for the first time for an Irish passport. Relying on this Irish nationality, Mrs. McCarthy and her husband argued that they were entitled to residence on the basis of Union law, namely in their capacity of Union citizen and husband of a Union citizen, respectively. Their application was rejected, however, by the British authorities on the ground that the conditions for a right of residence on the basis of Union law were not satisfied.[210]

The question to be answered by the Court was, again, whether the applicant could in the circumstances of the case rely on the provisions of Union law. Mrs. McCarthy had never exercised her right to free movement and, consequently, her situation, *prima facie*, seemed to amount to a purely internal situation. Yet, such was far from certain after the Court's judgment in *Ruiz Zambrano*, rendered a mere two months earlier. Moreover, the question arose whether the fact that Mrs. McCarthy possessed the nationality of another Member State than the Member State in which she resided could provide a sufficient link with Union law. As explained higher, some earlier cases, the *Garcia Avello* case in particular, appeared to confirm that the possession of the nationality of two Member States was sufficient in order to enable a Union citizen to invoke Union law.

---

208 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 39. The Court relied in this connection on Article 3(1) of Directive 2004/38, which provides that the directive applies to "all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members".

209 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr..

210 It is not fully clear whether this refusal was based on the fact that Mrs. McCarthy fell outside the scope of Union law or on the fact that she did not satisfy the conditions for a right of residence under Union law. Given that she was completely dependent on State benefits for her subsistence, she did in any event not satisfy the condition of self-sufficiency. The Court did not consider this element at all in its judgment, in contrast to AG Kokott (see Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] E.C.R. nyr, para. 44).

The Court ruled that Union law was not applicable in the circumstances of the case. In the first place, Mrs. McCarthy could not rely on the provisions of Directive 2004/38 because that Directive is only applicable to Union citizens who move to or reside in a Member State other than that of which they are a national.[211] Consequently, Mrs. McCarthy's husband could not derive rights from the Directive either. In the second place, Mrs. McCarthy could not invoke Article 21 TFEU since the contested national measure did not have the effect of depriving her of the genuine enjoyment of the substance of her citizenship rights or of impeding the exercise of her right of free movement and residence.[212] In this connection, the Court explicitly distinguished the circumstances of the *McCarthy* case from those at stake in *Ruiz Zambrano* and *Garcia Avello*.[213] The fact that Mrs. McCarthy possessed the nationality of two Member States could not change anything with regard to these findings. On the one hand, it did not change the fact that Mrs. McCarthy had never made use of her right to free movement.[214] On the other hand, this fact did not trigger the application of national measures depriving her of the genuine enjoyment of the substance of her citizenship rights or impeding the exercise of her right of free movement and residence.[215]

It is immediately apparent that the Court in *McCarthy* built on its judgment in *Ruiz Zambrano* in two regards. First of all, it repeated its view that Directive 2004/38 does not apply to static Union citizens, while providing a rather more elaborate justification for this point of view. Second, it repeated its holding that static Union citizens can fall within the scope of Union law where they are faced with a national measure depriving them of the genuine enjoyment of the substance of their citizenship rights, although it found this not to be the case in the circumstances of the case. Still, it must be pointed out that the judgment on this point presents two remarkable differences with the judgment in *Ruiz Zambrano*. In contrast with the latter judgment, the Court based its decision in *McCarthy* on Article 21 TFEU rather than on Article 20 TFEU. Moreover, it did not only refer to the deprivation of the enjoyment of citizenship rights, but consistently made reference too to impediments to the exercise of free movement rights. I will come back to these differences when analyzing the Court's judgment in more detail below (see under III.B.4.a.ii., *infra*)..

Before embarking on an analysis of the different proposals for enlarging the scope of Union law; it is important to make a point about an aspect of the *McCarthy* case that will be touched upon only sporadically below, namely the question of whether dual nationality can provide a sufficient link with Union law. As pointed out higher, after the judgment in *Garcia Avello*,[216] many commentators took the view that the possession of the nationality of two Member States sufficed for a Union citizen to fall within the scope of Union law. The case concerned a dispute regarding the family name of children of a Belgian-Spanish couple who lived in Belgium. The Court

---

211 ECJ, Case C-434/09 McCarthy [2011] E.C.R. nyr., paras 30-43.
212 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., paras 44-56.
213 I will discuss this point in more detail below.
214 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., paras 40-41.
215 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 54.
216 ECJ, Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, with case notes by Ackermann in (2007) *CML.Rev.*, 141-154; Foubert in (2005) *SEW*, 141-143 and Oosterom-Staples in (2004) *N.T.E.R.*, 57-61.

accepted that the situation of these children fell within the scope of Union law, despite the fact that they had never left Belgium. It pointed out that the children possessed both the Belgian and the Spanish nationality. Consequently, their situation was that of nationals of one Member State (Spain) legally residing on the territory of another Member State (Belgium) and this was sufficient, according to the Court, to consider their situation as falling within the scope of Union law.[217] On the substance of the case, the Court ruled that, as a consequence of the fact that the Belgian rules concerning the determination of surnames were different from the Spanish rules, the children would have to bear different surnames under different legal systems. This situation was liable to cause serious inconvenience for them at both professional and private levels and, therefore, infringed Union law.[218]

In *McCarthy*, the Court clarified that the fact that a Union citizen has the nationality of two Member States does not in itself provide a sufficient link with Union law. It will only provide such a link if it triggers the application of national measures depriving the citizen concerned of the genuine enjoyment of his citizenship rights or impeding the exercise of his right to free movement. On this point, the Court explicitly distinguished *Garcia Avello* from *McCarthy*.[219] Thereby the Court in fact gave a narrower interpretation to *Garcia Avello* than would appear from a literal reading of that judgment.[220] Moreover, the Court reformulated the *Garcia Avello* judgment in terms of obstacles to the right to free movement laid down in Article 21 TFEU, whereas the case itself was unquestionably decided under the principle of non-discrimination laid down in Article 18 TFEU. It clearly follows that the Court is of the opinion that the possession of dual nationality is not in itself relevant for the applicability of Union law. What matters is whether a national measure has the effect of depriving a Union citizen of the genuine enjoyment of his citizenship rights or impedes his free movement. This will be discussed in detail below (see under III.B.4.a., *infra*).

One important remaining question is whether cases of dual nationality, as just discussed, must be distinguished from a situation in which a static Union citizen resides in a Member State other than that of which he possesses the nationality. *Zhu and Chen* concerned a Union citizen who, just like Mrs. McCarthy, had never left her Member State of residence and who possessed the nationality of another Member State. To the difference of Mrs. McCarthy, however, she did not posses the nationality of her Member State of residence. The Court ruled, referring to its judgment in *Garcia Avello*, that this situation could not be assimilated to a purely internal situation.[221] The question arises whether the judgment in *McCarthy* affects

---

217 ECJ, Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, para. 27.

218 More specifically, the Court ruled that the refusal by the Belgian authorities to register the children under their surname formed in accordance with the Spanish rules constituted an unjustified discrimination of persons having the dual Belgian-Spanish nationality vis-à-vis persons having only the Belgian nationality.

219 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., paras 51-53.

220 A literal reading of the *Garcia Avello* judgment gives the impression that the Court decided that the case fell within the scope of Union law purely on account of the fact that the children also had the Spanish nationality (see ECJ, Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613, para. 27; see similarly ECJ, Case C-353/06 *Grunkin and Paul* [2008] E.C.R. I-7639, para. 17). Possible impediments to the exercise of their rights are only discussed later in the *Garcia Avello* judgment, *i.e.* after the Court established that Union law was applicable to the case.

221 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 19.

the outcome of such cases too. In other words, it can be wondered whether the fact that a Union citizen has only the nationality of a Member State other than his Member State of residence suffices to bring him within the scope of Union law. A literal reading of certain passages in the *McCarthy* judgment appear to support a negative answer. In particular, the Court's emphasis on the fact that only Union citizens who have moved to another Member State can rely on the provisions of Directive 2004/38 would seem to support that conclusion.[222] Still, it is probably the case that Union citizens like the applicant in *Zhu and Chen* have to be regarded as automatically falling within the scope of Union law, even after the *McCarthy* judgment. The reason is that a static Union citizen who only possesses the nationality of another Member State than the one in which he resides can unquestionably be qualified as a Union citizen residing in a Member State other than the one of which he possesses the nationality.[223] On this ground, Union law and Directive 2004/38 in particular will arguably be applicable to his situation.[224]

2. Article 21 TFEU

a) Self-standing right of residence

The first proposal of AG Sharpston in her Opinion in the *Ruiz Zambrano* case was to interpret Article 21 TFEU as conferring a free-standing right of residence, irrespective of any movement between Member States and of a link with two or more Member States. This would obviously entail a reversal of the existing case law, as the Union Courts traditionally systematically require a link with at least two Member States in order to apply Article 21 TFEU to a given situation.

Article 21 TFEU confers the right to "move and reside freely within the territory of the Member States". This is the general right of free movement and residence enjoyed by Union citizens, of which the free movement rights conferred on the different categories of economically active persons are specific expressions.[225] The right contained in Article 21 TFEU in fact "builds" on these previously existing specific free movement rights, but extends the group of beneficiaries of free

222 See in particular ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 38.

223 As required by Article 3(1) of Directive 2004/38. He or she will never have resided in the Member State of his or her nationality, in contrast to persons like Mrs. McCarthy who will always have resided in a Member State of which they have the nationality.

224 Accordingly, on this ground *Zhu and Chen* can be distinguished from *McCarthy* (see, in the same vein, Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] E.C.R. nyr, para. 37). An additional justification for this distinction is that applying the provisions of Directive 2004/38 to Union citizens having the nationality of their Member State of residence is arguably in violation of international law (see ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 34 and the discussion under III.B.2.a., *infra*), whereas this objection does not apply when the provisions of Directive 2004/38 are applied to static Union citizens who only posses the nationality of another Member State.

225 See, *e.g.*, ECJ, Case C-193/94 *Skanavi* [1996] E.C.R. I-929fs, para. 22 (on the freedom of establishment); ECJ, Case C-100/01 *Oteiza Olazabal* [2002] E.C.R. I-10981, para. 26 (on the free movement of workers); ECJ, Case C-208/05 *ITC* [2007] E.C.R. I-181, para. 64 (on the freedom to provide services).

movement rights to include also non-economically active persons.[226] If that underlying, historical origin is taken into account, it should be clear that Article 21 TFEU was based on the idea of a movement between Member States. Indeed, the "classic" free movement rights of economically active persons necessarily require a movement between Member States as they are concerned with removing barriers between Member States in order to further the objectives of the internal market.[227] Certainly in the initial years, the free movement rights of Union citizens were entirely based on those of economically active persons, causing some commentators to characterise Union citizenship as a form "market citizenship".[228] However, interesting to note is that the Court even in some recent judgments seems to confirm that the reasoning to be followed under Article 21 TFEU is completely analogous to the reasoning to be followed under the provisions on the free movement of economically active persons.[229]

Still, it could be argued that the provisions on Union citizenship, and the significance that has gradually been attributed to them, supersedes the objectives of the internal market and that, hence, Article 21 TFEU should *not* be interpreted analogously with the classic free movement provisions. As AG Ruiz-Jarabo Colomer has pointed out:

> "The creation of citizenship of the Union, with the corollary of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union."[230]

This has led some commentators to defend the theory that the rights laid down in Article 21 TFEU are not concerned with removing obstacles to the internal market and thus should find application regardless of any element of movement between

---

226 More precisely, the right of free movement and residence for non-economically active persons was in fact already laid down in three directives adopted in 1990: Council Directive 90/364/EEC of 28 June 1990 on the right of residence, [1990] O.J. L180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, [1990] O.J. L180/28; Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, [1990] O.J. L180/30, later replaced by Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, [1993] O.J. L317/59. On the historical origins of the general right of free movement and residence, see O'Leary *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), 109 *et seq.* and the many references cited therein.

227 This is very well explained in Tryfonidou *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International, 2009), Chapter 1 and Papadopoulou, "Situations purement internes et droit communautaire: un instrument jurisprudentiel à double fonction ou une arme à double tranchant?" (2002) *C.D.E.*, 117 *et seq.* See also, in detail, Spaventa *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context* (Alphen aan den Rijn, Kluwer Law International, 2007), 63 *et seq.*

228 See Everson, "The Legacy of the Market Citizen", in Shaw and More (eds.), *New Legal Dynamics of European Union* (Oxford, Clarendon, 1995), 73-89. See also O'Leary *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), 68-70. For an interesting argument that "market citizenship" may still be an appropriate descriptor of Union citizenship in its current state, see Nic Shuibhne, "The Resilience of EU Market Citizenship " (2010) 47 *CML Rev.*, 1597-1628.

229 See, in particular, ECJ, Case C-152/05 *Commission v Germany* [2008] E.C.R. I-39, paras 20-30.

230 Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1996] E.C.R. I-3343, para. 34; Opinion of AG Ruiz-Jarabo Colomer in Case C-386/02 *Baldinger* [2004] E.C.R. I-8411, para. 25.

Member States. This application of Article 21 TFEU, which would mean a reversal of the Court's case law, would allow to cure most instances of reverse discrimination, because even "static" citizens would in their home Member State be entitled to rely on Article 21 TFEU in order to claim the rights and benefits deriving from Union law. Tryfonidou has argued that reverse discrimination is a difference in treatment based on the fact that a person has not contributed to the construction of the internal market.[231] This phenomenon can, still according to Tryfonidou, be explained by the fact that Union law traditionally only applied to persons who contributed to the aim of attaining the internal market and that, consequently, persons who did not so contribute could not rely on the rights conferred by Union law. The introduction of the provisions on Union citizenship means that Union law no longer only includes within its scope persons who have contributed to the internal market. Tryfonidou concludes that the criterion of having contributed to the internal market is no longer reasonable and that reverse discrimination is therefore no longer justified and should be held incompatible with Union law and with the principle of equal treatment in particular.

I find it hard to fully agree with Tryfonidou's analysis. While I agree with her observations that reverse discrimination traditionally arose because Union free movement law was concerned only with persons contributing to the internal market and that the introduction of Union citizenship means that economic activity is no longer required for the Union free movement provisions to apply, I find the conclusion she reaches on this basis far from inescapable. Even if the provisions on the free movement of Union citizens are no longer only concerned with economically active persons, they may still aim at promoting movement between Member States. Historically this aim was linked to the internal market, since guaranteeing the free movement of economically active persons would further the completion of the internal market. With regard to non-economically active Union citizens, this aim may well be linked to other purposes, such as the need to strengthen European integration [232]or, in the case of students for instance, the need to strengthen the European higher education area.[233] In other words "movement" has not necessarily become irrelevant as a criterion in a Citizens' Europe. Consequently, what Tryfonidou fails to acknowledge in my view is that the extension of the scope of beneficiaries of the free movement provisions was accompanied with an extension of or a shift in the purposes pursued by these provisions.[234] Accordingly, instances of reverse discrimination, made possible by the current application of Article 21 TFEU, should be analysed along the lines of these new purposes pursued. If movement is relevant to the achievement of these purposes, Union free movement law may possibly still only

---

231 See Tryfonidou *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International, 2009), 154 *et seq.* See also Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe" (2008) 35 *L.I.E.I.,* 43-67.

232 This view fits well with what Bauböck has labelled a "unionist perspective" to Union citizenship (Bauböck, "Why European Citizenship? Normative Approaches to Supranational Union", (2007) *Theoretical Inquiries in Law,* 470).

233 As is explicitly acknowledged in Communication from the Commission of 3 March 2010, EUROPE 2020: A strategy for smart, sustainable and inclusive growth, COM(2010) 2020.

234 Admittedly, in one article Tryfonidou does seem to make a distinction between the aims pursued by the provisions on the free movement of economically active persons and the provisions on the free movement of Union citizens in general, without however specifying the latter or changing her findings in view of this distinction (Tryfonidou, "In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?" (2009) 46 *CML Rev.,* 1591-1620).

apply to moving Union citizens,[235] creating the possibility for unfavourable treatment of static citizens. It is therefore far from an inescapable conclusion that the discrimination between static Union citizens and moving Union citizens should now be held incompatible with Union law.

There are, in fact, strong arguments in favour of the view that Article 21 TFEU, even though it is not mainly concerned with the objectives of the internal market, still requires an element of movement between Member States. First, it should be pointed out that the movement of Union citizens furthers some of the Union's most important non-economic objectives, such as social cohesion and political integration.[236] The crucial importance of the mobility of Union citizens is confirmed in various important policy documents such as the Action Plan Implementing the Stockholm Programme[237] and the Commission guidance for better transposition and application of Directive 2004/38.[238] Residence in one's own Member State – at least in the absence of any preceding movement - does not further these interests to the same extent, and could on that ground be argued not to be covered by Article 21 TFEU. Against this background, it would be defensible to interpret Article 21 TFEU as being concerned with movement between Member States. Accordingly, it would be logically coherent to limit its application to Union citizens who have moved between Member States.

Very interesting in this connection is the Opinion of AG Ruiz-Jarabo Colomer in *Petersen*, in which he proposed a new framework for applying the provisions on the free movement of economically active Union citizens and non-economically inactive Union citizens.[239] Simply put, the AG suggested that the protection afforded by the

---

235 This would possibly also comprise static citizens holding the nationality of another Member State, since their situation could arguably be equated to that of moving Union citizens. I will elaborate this point further below.

236 The promotion of cohesion and integration are fundamental objectives of the Union, as is clear from Article 3(3) TEU and Title XVIII of the TFEU and from the preamble to the TEU). Where a Union citizen moves to another Member State and resides there, such will likely create bonds between nationals from different Member States and thereby foster social cohesion. Residence in another Member State entitles a Union citizen moreover to take part there, under certain conditions, in municipal elections (see Article 22(1) TFEU), which is beneficial for political integration. The aims of fostering social cohesion and integration are expressly stated in recitals 17 and 18 to the preamble of Directive 2004/38. See also the discussion in Maas *Creating European Citizens* (Lanham, Rowman & Littlefield, 2007), 100 *et seq.*, who notes the argument that "increased mobility within Europe will facilitate building a shared political community" (at p. 102) and observers that "movers develop a sense of European loyalty and entitlement (at p. 105).

237 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, which states (at p. 4): "Facilitating citizens' mobility is of crucial importance in the European project. Free movement is a core right of EU citizens and their family members. It needs to be rigorously enforced".

238 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, which states (at p. 3) that "The free movement of citizens constitutes one of the fundamental freedoms of the internal market and is at the heart of the European project and that the freedom of movement of persons is one of the foundations of the EU".

239 Opinion of AG Ruiz-Jarabo Colomer in Case C-228/07 *Petersen* [2008] E.C.R. I-6989, paras 13-39.

provisions on the free movement of citizens should depend on whether there is a link to the fundamental rights or to the democratic factors of belonging to a political community.[240] The AG's suggestions were not taken over by the Court in its judgment[241] and I will not discuss them in any detail here. The point of interest to note is that the AG's proposal clearly shows that interpreting the free movement Union citizenship as going beyond the objectives of the internal market does not mean that movement between States becomes irrelevant, but rather that such movement may be thought to serve other, non-economic, objectives.

Second, limiting Article 21 TFEU to cases of movement between Member States seems to accord with the intention of the Member States, the masters of the Treaties. Although the wording of Article 21 TFEU[242] is inconclusive in this regard, it must not be overlooked that that Article explicitly states to be subject to the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". An analysis of the wording of Directive 2004/38 strongly indicates that its provisions are limited to cases of movement between Member States, as was very well explained by AG Kokott in her Opinion in *McCarthy*[243] and confirmed by the Court in *Ruiz Zambrano*[244] and *McCarthy*.[245] In *McCarthy*,[246] the Court pointed out, moreover, that under international law nationals have an unconditional right to residence in their home State, irrespective of economic activity. It would be problematic therefore to hold that Article 21 TFEU includes this right and subjects it to the "limitations and conditions" of Directive 2004/38.[247]

---

240 According to AG Ruiz-Jarabo Colomer, if such a link was present, the provisions on Union citizenship, Articles 20 and 21 TFEU in particular, would come into play, both with regard to economically active and non-economically active Union citizens. This would have for a consequence that the Union citizens in question would be afforded the highest level of protection. In the absence of such a link, the margin of discretion of the Union legislature and the national authorities would be increased (see Opinion of AG Ruiz-Jarabo Colomer in Case C-228/07 *Petersen* [2008] E.C.R. I-6989, paras 36-38).

241 ECJ, Case C-228/07 *Petersen* [2008] E.C.R. I-6989 (the Court decided the case purely on the basis of the free movement provisions on economically active persons).

242 The *wording* of Article 21 TFEU itself does not give a conclusive answer as to whether residence in one's own Member State in the absence of any movement is covered by that article. As AG Sharpston has pointed out, there is no textual obstacle to interpreting the "right to move and reside freely within the territory of the Member States" as "freedom *both* to move *and* to reside" (Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 144). In this respect, Article 21 TFEU is no different than Article 45(3)(b) TFEU. As AG Warner remarked in his Opinion to the *Saunders* case, the wording of that Article (which used to be Article 48(3)(b) TEEC) was not limited to movement between Member States (Opinion of AG Warner in Case 175/78 *Saunders* [1979] E.C.R. 1129, p. 1143). The Court, however, clearly limited its interpretation of the Article to situations of "movement" (ECJ, Case 175/78 *Saunders* [1979] E.C.R. 1129, paras 10-11).

243 Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] E.C.R. nyr, paras 24-31.

244 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 39.

245 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., paras 30-38.

246 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., paras 29 and 33-34 (referring to Article 3 of Protocol No 4 to ECHR).

247 See, in this connection also ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, para. 31. Admittedly, it does make a difference whether the right of residence is derived from international law or from Union law in terms of the residence rights enjoyed by family members, as is perfectly demonstrated by the *McCarthy* case.

Third, it is clear that the Court's case law, as already indicated, seems to be predicated on the idea that Article 21 TFEU is necessarily limited to cases of "movement". This case law, holding *inter alia* that "Directive 2004/38 aims to facilitate the exercise of the fundamental right of residence of Union citizens in a Member State other than that of which they are a national"[248] is justified if considered in the light of the two observations just set out. Admittedly, the Court has applied the free movement provisions in cases in which no physical movement was present, as was pointed out by AG Sharpston in her Opinion to *Ruiz Zambrano* as an argument in favour of her view that Article 21 TFEU is not limited to cases of movement.[249] The two classic examples that are invariably cited in this context are *Garcia Avello* and *Zhu and Chen*. Those cases were concerned, however, with the rights in one Member State enjoyed by nationals from another Member State. Applying Union law in those cases is consistent with both the aims of the free movement provisions and their wording.[250] Moreover, *Garcia Avello* concerned national measures creating restrictions to the right to travel to other Member States rather than to the right of residence in one's own Member State. The possible application of Article 21 TFEU to the circumstances of that cases would arguably therefore not be justified on account of the mere fact that Union citizens residing in their own Member State had never left their Member State. This will be further discussed below.

Concluding, the first option for enlarging the scope of Union law would be to interpret Article 21 TFEU as conferring an independent right of residence in the Member States, irrespective of any inter-State element. The main advantage of this approach would be that it would make reverse discrimination of Union citizens impossible, in contrast to the classic approach towards the free movement of Union citizens. It would have for a consequence that any Union citizen residing in a Member State would fall within the scope of Union law, regardless of any movement between Member States, and could claim the rights conferred by Union law, the right to equal treatment in particular.[251] Member States could, as a consequence, no longer deny the (more favourable) rights deriving from Union law to their static nationals. Specifically with regard to family reunification, it would mean that static Union citizens could also invoke the right to be joined or accompanied by family members, under the conditions of Directive 2004/38.

At the same time, the suggested interpretation would potentially have a significant impact on the competences of the Member States[252] because Union law would become applicable in cases thought hitherto to be purely internal ones. Specifically with regard to the rights enjoyed by family members of Union citizens, it would oblige Member States to accord to their own nationals the rights relating to family

---

248 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 89.

249 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 77-78.

250 Member State nationals with the nationality of another Member State are undeniably nationals from another Member State. Giving them rights in their home Member State contributes to the integration of nationals from another Member State into the society of that State and thereby promotes social cohesion. It could be argued, moreover, that, at least in the *Zhu and Chen* case, the situation of the Union citizen concerned was brought within the scope of Union law by assimilating her situation to those of moving Union citizens.

251 Each form of less favourable treatment of static Union citizens compared with moving Union citizens could be characterised as an obstacle to this right of residence in the own Member State.

252 See Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?" (2009) 34 *E.L. Rev.*, 449-450.

reunification laid down in Directive 2004/38, regardless of any inter-State element. In some Member States, which accord their own nationals the same rights as Union citizens,[253] such would not have great consequences.[254] Other Member States, however, accord nationals who fall outside the scope of Union law lesser rights regarding family reunification than Union citizens falling within this scope.[255] Depending on how strictly the requirement of an inter-State element is interpreted, these lesser rights regarding family reunification currently cover substantial groups of Union citizens.[256] Indeed, some authors have stated that the majority of Union citizens currently fall outside the scope of Union law.[257] Accordingly, the first proposal would entail in the second category of Member States that all nationals would be able to claim the rights regarding family reunification laid down in Directive 2004/38. This would obviously have a substantial impact on the immigration policies of the Member States concerned.[258] The suggested enlargement of Union law would not be restricted to specific circumstances, moreover, but extend to all Union citizens residing in a Member State without any further condition. For this reason, of the three proposals discussed here, the first proposal is by far the one which would have the largest impact on the competences of the Member States.

As explained in the foregoing, the suggested wide interpretation of Article 21 TFEU is problematic because it seems not fully in accordance with the underlying intentions of the Member States in adopting the provisions on the free movement of Union citizens or with the objectives pursued by those provisions.[259] It is a doubtful basis therefore for such a major overhaul in the case law of the Union Courts, especially in

---

253 This has traditionally been the case in Belgium, for instance. The same is true, with some exceptions, in Spain and Italy. See the discussion in Walter *Reverse Discrimination and Family Reunification* (Nijmegen, Wolf Legal Publishers, 2008), 15-19. Recently, however, a legislative proposal has been adopted to restrict the rights of Belgian nationals when compared to other Union citizens. See the legislative proposal (*wetsontwerp*) of 26 May 2011 "tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen voor wat betreft de voorwaarden tot gezinshereniging". For a detailed discussion of this legislative proposal, see Cambien, "Mogen statische Unieburgers worden gediscrimineerd? Enkele beschouwingen bij *Ruiz Zambrano* en *McCarthy*" (2011) *T.Vreemd*, 242-253.

254 Even in Member States that accord exactly the same rights to all Union citizens, it will make some difference whether a Union citizen falls within the scope of Union law or not since Union citizens within the scope of Union law derive important procedural guarantees from Union law (see also n. 285 and accompanying text, *infra*).

255 This is the case, *inter alia,* in Denmark and the Netherlands. For an overview of the legal regime surrounding family reunification of static Union citizens, mobile Union citizens and third country nationals in different Member States, see Walter *Reverse Discrimination and Family Reunification* (Nijmegen, Wolf Legal Publishers, 2008), 5-23.

256 For a discussion of how flexible or demanding the inter-State element is interpreted in the current case law, and the legal uncertainty currently surrounding this issue, see *infra*, under III.C.

257 See, for instance Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights" (2009) 15 *Colum. J. Eur. L.*, 214.

258 Remark in this regard that family reunification in many European countries is the most important form of migration both in terms of numbers and in terms of its impact on the receiving society (see Groenendijk, "Family Reunification as a Right under Community Law" (2006) 8 *Eur. J. Migration & L.,* 215).

259 For this reason, I also find the parallel drawn by AG Sharpston in *Ruiz Zambrano* with the *Rottmann* case to be problematic. As I explain below, a fruitful parallel with the *Rottmann* case can be drawn, however, when one focuses on Article 20 TFEU rather than on Article 21 TFEU (see the discussion under III.B.4*., infra*).

view of the fact that it would lead to a significant shift in the division of competences between the Union and the Member States. As AG Sharpston remarked herself: "it is necessary to avoid the temptation of 'stretching' Article 21 TFEU so as to extend protection to those who 'just' fail to qualify".[260] This enlargement of the scope of Article 21 TFEU would probably require an intervention of the Union legislator (see the discussion under III.B.5., *infra*). Besides, it could be objected to the first approach that if one is concerned with curing reverse discrimination, a solution should rather be founded on the basis of Article 18 TFEU. This will be further examined below (see under III.B.3, *infra*).

b) Obstacles to future movement

On the basis of the foregoing, it can be concluded that Article 21 TFEU should not be interpreted, under the current stance of the law, as conferring a free-standing right of residence. There is, however, an alternative approach which would allow treating Article 21 TFEU as a sufficient link with Union law even with regard to static Union citizens in their home Member State. This approach, which is clearly apparent in the *McCarthy* judgment,[261] focuses not on the right to residence in the home Member State, but rather on the right to leave the home Member State and move to another Member State. It is thus in accordance with the view just set out that Article 21 TFEU is concerned with taking away obstacles to movement between Member States.

The Court has in the past held that Member States may not unjustifiably hinder the exercise of the right to free movement by their own nationals by making it difficult or impossible for them to move to another Member State.[262] The most extreme such case is probably *Jipa*,[263] which concerned an outright prohibition imposed by the home Member State to travel to another Member State. The Court confirmed that "the fundamental freedoms guaranteed by the [Treaties] would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State".[264] It could be argued that, in cases like *Ruiz Zambrano* or *McCarthy*, the refusal of a right of residence to the close family member of a Union citizen, would, in certain circumstances, force this citizen to follow his family members to a third country.[265] As a consequence, it would, in practical terms, become impossible for them to travel from their home Member State to other Member States.

---

260 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 143.

261 See, although not fully similar, the argument made by AG Sharpston (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 98-103.

262 In the context of the free movement of goods, such national measures would be qualified as "export restrictions".

263 ECJ, Case C-33/07 *Jipa* [2008] E.C.R. I-5157. See the discussion in Oosterom-Staples, "Het fundamentele recht op vrij verkeer nader bepaald: het arrest Jipa onder de loep" (2009) *N.T.E.R.*, 12-17.

264 The Court referred, by way of analogy to cases dealing with the freedom of establishment and the free movement of workers: ECJ, Case 81/87 *Daily Mail and General Trust* [1988] E.C.R. 5483, para. 16; ECJ, Case C-379/92 *Peralta* [1994] E.C.R. I-3453, para. 31; and ECJ, Case C-415/93 *Bosman* [1995] E.C.R. I-4921, para. 97.

265 This is true first and foremost where it concerns a non-EU family member. Where it concerns a Union citizen, it will normally be possible to establish a right of residence in his or her Member State of nationality.

There are, however, some potentially problematic aspects to the reasoning just set out. In the first place, it would seem *prima facie* that the refusal of a right of residence to family members of a Union citizen in cases like *Ruiz Zambrano* or *McCarthy* would induce that citizen to exercise his free movement rights rather than hinder him in doing so. Indeed, by moving to another Member State the Union citizen concerned would bring himself within the scope of Union law and thereby secure a right of residence for himself and his family members in the Member States.[266] Admittedly, one problem in this connection is that it is not clear from the case law what "movement" would suffice for a Union citizen in order to bring his situation within the scope of Union law.[267] This uncertainty makes the incentive to exercise free movement rights perhaps less strong. However, the natural way for the Court to solve this problem would be to bring further clarification to the precise inter-State element required for a situation to fall within the scope of Union law rather than using this problematic aspect of its case law as a ground to widen the scope or Article 21 TFEU (see the discussion under III.C., *infra*). Another problem could be that a Union citizen and his family do not posses sufficient means in order to establish residence in another Member State, in particular where lawful residence in another Member State is required as a link with Union law.[268] Under such circumstances, a refusal of a right of residence, would not provide an incentive for a Union citizen to exercise his free movement rights, but rather require him to leave for a third country.

In the second place, even if it is accepted that a refusal of a right of residence to a close family member of a Union citizen, in the circumstances described, requires him to leave the Union to a territory where he cannot exercise his free movement rights, it does not automatically follow that such a situation falls within the scope of Article 21 TFEU. As the Court held in *Kremzow*, a purely hypothetical prospect of exercising free movement rights does not establish a sufficient connection with Union law to justify the application of Union provisions.[269] In the case of *Ruiz Zambrano*, there was no indication of any intention on part of the children to move to another Member

---

266 Admittedly, the Court in *Metock* held that a refusal of a right of residence to a family member of a Union citizen would be incompatible with Union law where it would "discourage him from continuing to reside in a Member State and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country" (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 89). However, crucially, the Court made this statement with regard to the host Member State, not the home Member State.

267 See the discussion on arbitrariness and uncertainty under III.C., *infra*. This point is sharply exposed by AG Sharpston in *Ruiz Zambrano*. The AG wonders whether it could suffice for a a friendly neighbour to take Diego and Jessica on a visit or two to Parc Astérix in Paris, or to the seaside in Brittany in order for them to establish a sufficient link with Union law (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 86). It seems, however, not sensible, to accept that such a visit would be sufficient in this regard. Accordingly, on the facts of *Ruiz Zambrano*, there does not seem to be a realistic option for the children to establish a "cross-border" element. Hence, the refusal of a right of residence to their parents cannot realistically be said to induce them to exercise their right to free movement by moving to another Member State (see further the discussion below, under III.B.4.a., *infra*).

268 See the discussion on arbitrariness and uncertainty, *infra* under III.C.

269 ECJ, Case C-299/95 *Kremzow* [1997] E.C.R. I-2629, para. 16, with a case note by Brems in (1997) *Colum. J. Eur. L.*, 474-479. See also ECJ, Case 180/83 *Moser* [1984] E.C.R. 2539, para. 18. See also the discussion in Poiares Maduro, "The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations", in Kilpatrick, Novitz and Skidmore (eds.), *The Future of Remedies in Europe* (Oxford and Portland, Hart Publishing, 2000), 122-123.

State. In such circumstances, the obstacle to the exercise of the right to free movement might be too "thin" in order to trigger the application of Article 21 TFEU. However, it appears that the Court has in recent cases adopted a more lenient approach towards possible future exercises of the right to free movement.[270] In cases like *Garcia Avello* or *Grunkin and Paul,* for instance, it has accepted that impediments to the potential future exercise of the right to free movement can suffice in order to bring a situation within the scope of Union law. Consequently, the second problem just mentioned seems to be no longer an issue.

The conclusion from the foregoing is that Article 21 TFEU could, if certain conditions are satisfied, provide a sufficient link with Union law, even with regard to static Union citizens. Specifically with regard to family reunification, a national measure refusing a right of residence to the non-EU family member of a static Union citizen would trigger the application of Article 21 TFEU if it would force the latter to leave the territory of the Union and thereby make it impossible for him to move from his Member State to another Member State in the future. The Court accepted this reasoning for the first time explicitly in *McCarthy*.[271] However, it explicitly linked it to the Court's holding in *Ruiz Zambrano* that national measures depriving a (static) Union citizen of the genuine enjoyment of his citizenship rights fall within the scope of Union law. As I will explain below, impediments to the right to move to another Member State should be seen as one such instance of deprivation of the genuine enjoyment of citizenship rights. I will therefore consider the conditions for its applications in more detail below in the framework of the discussion of the argument that measures depriving a Union citizen of the enjoyment of the substance of his Union citizenship rights should trigger the applicability of Union law (see under III.B.4., *infra*). Since that argument, grounded on Article 20 TFEU, takes other citizenship rights into account besides the right to free movement, it is a more weighty and convincing justification for extending the scope of Union law to static Union citizens than Article 21 TFEU considered independently.

3. Articles 18 and 21 TFEU

I will now turn to the second proposal found in the Opinion of AG Sharpston in *Ruiz Zambrano*. This second proposal is not so much centred on a wider interpretation of Article 21 TFEU, but rather on a wider interpretation of Article 18 TFEU, which lays down the principle of equal treatment. It would allow applying Article 18 TFEU to certain instances of reverse discrimination, subject to a number of limitations. In its most basic version, the proposal would come down to interpreting Article 18 TFEU as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law which entails a violation of a fundamental right protected under Union law, where at least equivalent protection is not available under national law. This would essentially subject the interpretation to three restrictive conditions, as I

---

270 See Van Elsuwege and Adam, "Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance flamande" (2008) *C.D.E.*, 680.

271 Previously, the Court had never held that a measure hindering the (future) exercise of free movement rights fell within the scope of Union law in a case where a previous inter-State element was absent On the facts of *Jipa*, for instance, it was clear that the case concerned the measures imposed by the Romanian authorities in reaction to previous illegal residence in Belgium and the decision of the Belgian authorities to repatriate.

pointed out above.[272] In the following, I will try to determine the precise meaning of and justification for these limitations, which will allow me to evaluate the persuasiveness and legal soundness of the proposal.

In the first place, it is clear that the proposal would only concern cases involving Union citizenship. This would not, in my view, imply a large restriction *ratione materiae*, as Union citizenship is often used as a "triggering" element to claim rights in very diverse fields, even in fields which the Union is not competent to regulate.[273] By contrast, this probably would entail a restriction *ratione personae,* since it is clear, in my view, that legal persons are not Union citizens.[274] Moreover, the AG's proposal only concerns cases involving Article 21 TFEU, so it would not entail any change as regards cases involving other fundamental freedoms than the free movement of persons, such as cases involving the free movement of goods.[275] More difficult to determine is whether the AG's proposal is limited to non-economically active Union citizens. I do not think this is the case, because, first, Article 21 TFEU, in its most general sense, applies to both economically active and non-economically active persons and, second, the aim of the AG Sharpston proposal is to cure, under certain conditions, reverse discrimination, which can currently be inflicted on static citizens, regardless of whether they are economically active or not.[276] It is clear, by contrast, that the proposal does not concern in the first place reverse discrimination in the carrying out of an economic activity, but rather reverse discrimination suffered in a field closely linked to the social or political dimension of the status of Union citizen.[277] Rights related to family reunification could, in the current stance of Union law, certainly be said to belong to that dimension.[278]

---

272 See under III.B.1.b., *supra.*

273 For a discussion, see Van Nuffel and Cambien, "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren" (2009) 57 *SEW*, 144-154.

274 White, *Workers, Establishment, and Services in the European Union* (Oxford, Oxford University Press, 2004), 260-261.

275 This means, for instance, that manufacturers of goods in a "purely internal situation" would not benefit from the new interpretation of Article 18 TFEU in order to claim more rights vis-à-vis their Member State (see, for instance, ECJ, Joined Cases 314-316/81 and 83/82 *Waterkeyn* [1982] E.C.R. 4337 and the resulting reverse discrimination for certain categories of French producers). See the discussion in Poiares Maduro, "The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations", in Kilpatrick, Novitz and Skidmore (eds.), *The Future of Remedies in Europe* (Oxford and Portland, Hart Publishing, 2000), 120-122.

276 Remark in this connection that AG Sharpston explicitly states that her second proposal concerns Union citizens resident in their Member State of nationality "who had not exercised free movement rights under the TFEU (*whether a classic economic free movement right or free movement under Article 21 TFEU*)" (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 146 (emphasis added)).

277 In this connection, I suggest that a distinction could be made between Union citizens in their capacity of economic actors and Union citizens "as citizen". The second proposal by AG Sharpston should in my view only concern the second set of cases. Some support for making such a distinction can be found in an Opinion of AG Jacobs, in which he stated "the present case concerns not the rights of citizens of the Union acting as such but the professional activities of a trade mark agent submitting an application to register a trade mark" (Opinion of AG Jacobs in Case C-361/01 P *Kik* [2003] E.C.R. I-8283, para. 47 (emphasis added)). Further support for this distinction can be found in the Opinion of AG Ruiz-Jarabo Colomer in *Petersen*, which was briefly discussed higher (Opinion of AG Ruiz-Jarabo Colomer in Case C-228/07 *Petersen* [2008] E.C.R. I-6989, paras 13-39).

278 See, for a detailed discussion in this sense, Goldner, "Family Reunification of European Community Nationals" (2005) *Croatian Yearbook of European Law & Policy*, 163-202.

A related question is whether the restriction of reverse discrimination to cases involving Article 21 TFEU would restrict the scope of Union citizenship cases concerning reverse discrimination in any meaningful way. One could be led to think that every case of reverse discrimination suffered by a Union citizen is the direct consequence of the current interpretation of Article 21 TFEU as not being applicable to static citizens.[279] This is correct, except, of course, when the Court's recent case law is taken into account. As a consequence of cases *Rottmann* and *Ruiz Zambrano*, certain categories of Union citizens will be able to invoke Article 20 TFEU, but under rather restrictive conditions only. This, again, creates the possibility of reverse discrimination of static Union citizens who do not satisfy the conditions for invoking Article 20 TFEU. Consequently, reverse discrimination is at present more accurately made possible by the limited interpretation of both Articles 20 and 21 TFEU, even though it will still mainly arise as result of the limited application of Article 21 TFEU. The bottom-line is probably that Article 21 TFEU could limit the scope of AG Sharpston's second proposal in the most meaningful way in the sense that it would exclude cases of reverse discrimination relating directly to economic activities. Applying such a limitation would leave the Court's current interpretation of the economic free movement rights unaffected, at least as far as economic activities are concerned.[280]

In the second place,[281] the reverse discrimination concerned would need to entail a violation of a fundamental right protected under Union law and national law should not afford adequate protection of that right. The fundamental right which is primarily relevant in this context is the right to respect for family life. It is clear from the case law of the ECtHR, which the ECJ considers to be a guiding source, that the refusal of the right for close family members to reside with a Union citizen in the latter's home Member State can constitute a violation of Article 8 ECHR.[282] If national law in such a situation would not provide adequate remedies to protect that right in a way at least equivalent to the protection offered by Union law, a static Union citizen would be entitled to rely on Article 18 TFEU and claim equal protection of that right as is enjoyed by moving citizens. Accordingly, the national court would have to apply to this Union citizen Union law and the protection contained therein of fundamental rights. Consequently, the second proposal would make Union law a remedy for reverse discrimination where national law would tolerate a violation of the right to

---

279 Even in *Zhu and Chen*, which did not involve physical movement between Member States, the situation was considered to fall within the scope of Union law by applying Article 21 TFEU (ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 26).

280 The issue of residence rights for family members of economically active Union citizens would come under the said proposal since it concerns the social dimension of Union citizenship rather than pure economic activity. In this regard, the proposal would mean a change towards the current interpretation of the provisions on the free movement of economically active persons.

281 I treat the second and third condition mentioned by AG Sharpston in this connection together here, because that better suits the structure of my analysis.

282 See the detailed discussion in Chapter 5, *infra*. On the facts of *Ruiz Zambrano*, AG Sharpston considered that if Mr. Ruiz Zambrano would be refused a right of residence by the Belgian authorities, Article 8 ECHR would likely be violated, *inter alia* on account of the fact that he had apparently become fully integrated into Belgian society and did not pose a threat or danger (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 54-66). On the facts of *McCarthy*, AG Kokott considered that it could not entirely be ruled out that a refusal of a residence right to Mrs. McCarthy's husband constituted an inference with Article 8 ECHR (Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] E.C.R. nyr, paras 59-60).

respect for family life by not granting sufficient rights to family members of a static Union citizen.

There are a number of potential problems associated with this approach. First of all, there is the apparent problem that the scope of Union law would be made dependent on the interpretation of national law by the national court. This would, arguably, not be apt to guarantee uniformity and legal certainty throughout the Union. However, it can be countered that the national court will normally be the institution best placed to evaluate the protection offered by national law. Moreover, national courts are the "primary" courts responsible for applying and enforcing Union law in the Union legal system and allowing them the role described could be said to be in accordance with the Union principle of subsidiarity. In line with this, Union law has a long tradition of "subsidiary protection", as AG Sharpston remarked.[283] Admittedly, the examples cited by the AG concern national rules providing for effective protection of Union rules or principles and not national rules determining the scope of Union law. Still, the problem of legal uncertainty or lack of uniformity could be overcome by allowing the Union Courts to review the national court's interpretation of national rules on fundamental rights protection, in a way similar to what is possible with regard to the examples mentioned by the AG. The Court has often reviewed the compatibility with Union law of an interpretation of national law by a national court, even where it concerned the scope of Union law.[284]

Second, the question arises what the added value of Union law could be in situations involving a violation of fundamental rights caused by an inadequate national legal framework. Since all Member States are in any event bound by the ECHR, a Member State which did not adequately protect, for instance, the right to respect for family life, would in any event be obliged to remedy this situation and bring its national legal framework in accordance with the guarantees flowing from the ECHR. One could wonder therefore why it would be useful to apply Union law to the scenario described in the AG's second proposal. The answer is rather straightforward I believe. Union law would apply precisely in those situations where the Member State, despite being bound by the ECHR, would not adequately protect the fundamental rights contained therein. Allowing the national court to apply Union law in such situations would considerably strengthen the fundamental rights protection afforded to static Union citizens. As has been remarked by Spaventa, the applicability of Union law entails significant procedural guarantees such as the possibility and duty for each national court to set aside national rules conflicting with fundamental rights protected by Union law,[285] which would otherwise not necessarily be available to static Union citizens.

Third, and most importantly, the proposal would entail a limited but certain enlargement of the scope of Union law – compared to how it is currently interpreted –

---

283 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para 148. The AG cited the examples of the principles of effectiveness and equivalence, the right to effective legal protection and the principle of State liability for breach of Union law.

284 The *Metock and Others* case (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241) is a case in point: the Court reversed a decision of the national authorities, which reflected case law of that Member State's highest court, in which it was considered that a situation fell within the scope of national law rather than that of Union law.

285 Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 *CML Rev.*, 37-38.

and reduce the margin of appreciation of the Member States, which would have to comply with Union law in situations where this is at present not the case. The question is whether the considerations justifying this enlargement of the scope of Union law carry sufficient weight to outbalance considerations relating to the need to preserve the scope of Member State powers. AG Sharpston has pointed out that the ECJ has already been prepared, invariably sported by fundamental rights considerations, to give a generous interpretation of the scope of Union law in Union citizenship cases, but that the present case law lacks coherence and leads to random results. It is precisely the importance of fundamental rights for Union citizens and the idea that making their protection depend on movement can no longer be sustained in the context of a Citizens' Europe which brings her to suggest an approach which would enlarge the scope of Union law to some extent.

It must, however, immediately be remarked that even fundamental rights are only protected under Union law in situations falling within the scope of Union law. Consequently, they cannot be invoked in the absence of a link with Union law.[286] In other words, the mere fact that fundamental rights are violated cannot, according to settled case law, be considered sufficient to apply Union law. The question arises therefore what link with Union law the AG's second proposal is based on. Perhaps the link with Union law in the situation described is offered by the paramount importance of fundamental rights in the Union legal order and their particular importance for Union citizens. Fundamental rights could be said to carry a higher value than other rights associated with Union citizenship. On this basis, it could be argued that the protection of a Union citizen's fundamental rights should not be dependent on having moved between Member States.[287] In this connection, it must be remarked that the Court in its *Ruiz Zambrano* and *McCarthy* judgment relied on the fundamental nature of Union citizenship in order to extend the protection of Union law to static Union citizens. National measures depriving a person of the genuine enjoyment of the substance of the rights attached to Union citizenship are henceforth considered to fall within the scope of Union law.[288] It could be argued that the paramount importance attached to fundamental rights could similarly justify extending the protection for Union law to static Union citizens confronted with a national measure violating their fundamental rights. Still, it must be remarked that accepting this position would mean a departure from long-standing settled case law on fundamental rights.

Besides, one could object that if the approach followed in the AG's second proposal is in fact concerned with the protection of fundamental rights rather than with equal treatment, the reliance on Article 18 TFEU to enlarge the scope of Union fundamental

---

286 See also the discussion in Lenaerts and Gutiérrez-Fons, "The Role of General Principles of EU Law", in Arnull, Barnard, Dougan and Spaventa (eds.), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Oxford and Portland, Hart Publishing, 2011), 179-197 and Lenaerts and Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU Law" (2010) 47 *CML Rev.*, 1629-1669.

287 For a forceful argument that fundamental rights considerations may be relied on to cure instances of reverse discrimination, see Nic Shuibhne, "The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?", in Beaumont, Lyons and Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford and Portland, Hart Publishing, 2002), 177-196. See also Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question" (2002) 39 *CML Rev.*, at 171-173.

288 See the detailed discussion under III.B.4., *infra*.

rights protection is rather artificial. Making the Union fundamental rights protection dependent on a direct link with Union law, provided for instance by the existence of Union competence [289] or by Article 20 TFEU, [290] may be thought to be more straightforward. In this connection, it has been argued that the reliance on the principle of equal treatment does add an important dimension to the second proposal. An important rationale for having Union law apply in the scenario described above is that it is precisely Union law which creates a difference in the fundamental rights protection enjoyed by Union citizens, namely by affording only Union citizens that can rely on Article 21 TFEU the Union level of protection, while leaving other Union citizens with a potentially insufficient fundamental rights protection. Accordingly, it has been argued that where Union law causes an unequal treatment it should offer the Member States the legal solution to remedy this treatment.[291] Allowing the national courts to apply Union law in cases of inadequate fundamental rights protection offers them exactly such solution, [292] while at the same time making them the primary responsible for mastering and implementing the solution. Still, this reasoning is problematic, because it is somewhat circular: in a sense, the fact that fundamental rights are only protected by Union law within the scope of Union law is relied upon in

289 See in this connection, the third and last part of the Opinion of AG Sharpston in *Ruiz Zambrano* (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 151-177). In this third proposal, AG Sharpston suggests to make the availability of Union fundamental rights protection dependent "neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence"*. For interesting observations on this part of AG Sharpston's Opinion, see Craig, "The ECJ and Ultra Vires Action: A Conceptual Analysis" (2011) 48 *CML Rev.*, 429 *et seq*.

290 See the discussion under III.B.4*., infra*.

291 This theory was advocated by Poiares Maduro, both in a scholarly contribution (Poiares Maduro, "The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations", in Kilpatrick, Novitz and Skidmore (eds.), *The Future of Remedies in Europe* (Oxford and Portland, Hart Publishing, 2000), 138-140) and in his Opinion in the *Carbonati Apuani* case (see Opinion of AG Poiares Maduro in Case C-72/03 *Carbonati Apuani* [2004] E.C.R. I-8027, paras 59-69). See also Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, 764-766. Ritter has objected to this approach, arguing that it is the Member States and not the Union that cause reverse discrimination (Ritter, "Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234 " (2006) 31 *E.L. Rev.*, 706). I do not agree with Ritter's view. Admittedly, stricter national rules give rise to instances of reverse discrimination and Member States have the power to take these instances away by changing their rules. Still, it can not be denied that the reverse discrimination in these instances arises in the first place because Union law offers more generous rights than the national legislator considered opportune for situations governed by the legal order of that Member State.

292 This is particularly the case where the national court would not, under national law, be competent to remedy the inadequate fundamental rights protection. As Poiares Maduro remarks: "The best solution to the problems raised by the fact that some national legal systems are not prepared to deal with question of reverse discrimination arising from the European integration process, is the empowering of national courts through [EU] law" (Poiares Maduro, "The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations", in Kilpatrick, Novitz and Skidmore (eds.), *The Future of Remedies in Europe* (Oxford and Portland, Hart Publishing, 2000), 139). This point is perhaps illustrated by the *Flemish Care Insurance* case, although not in relation to fundamental rights. In the aftermath of that case, it has been argued that the Belgian constitutional framework was simply not adequate to remedy the reverse discrimination at issue (see the discussion in Van Elsuwege and Adam, "The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination (Case note: Constitutional Court, Judgment 11/2009 of 21 January 2009)" (2009) 5 *EuConst,* 327-339).

order to argue that Union law should be extended to violations of fundamental rights traditionally considered to fall outside the scope of Union law.[293]

The bottom-line is that the second proposal of AG Sharpston is perhaps not altogether convincing. The link with the principle of equal treatment is somewhat artificial. Moreover, it is doubtful whether a violation of fundamental rights can provide a sufficient link with Union law in itself, on account of their fundamental importance for the Union legal order. The approach adopted by the Court in *Ruiz Zambrano* and *McCarthy* is perhaps more convincing. Considering Union citizenship as a sufficient link with Union law, under certain, circumstances, is more straightforward and, given the fundamental status of Union citizenship, arguably more persuasive as an argument for extending the scope of Union law. Below I will argue that fundamental rights can be considered a one as one of a package of rights attached to Union citizenship. National measures violating fundamental rights can therefore be considered to fall within the scope of Union law to the extent that they can be said to have as a consequence the deprivation of the person concerned of the genuine enjoyment of his Union citizenship rights.[294] The explicit and intrinsic link with Union citizenship arguably provides a stronger foundation for the extension of Union law to static Union citizens confronted with certain measures violating their fundamental rights. It is likely therefore that the ECJ will confirm and further consolidate this approach rather than adopt the second proposal of AG Sharpston.

Still, the second proposal of AG Sharpston is not without merits. Allowing Union law to be applied in situations where national law does not adequately protect fundamental rights considerably strengthens the protection of those rights and furthers the Union's objective to constitute an area of freedom, security and justice with respect for fundamental rights.[295] Certainly after the entry into force of the Lisbon Treaty, and the ever growing importance attributed to fundamental rights,[296] such enlargement of the scope of Union law would seem desirable. At the same time, the scope of the enlargement and thus the impact on the competences of the Member States is rather limited if it is interpreted in accordance with the limitations set out higher. Moreover, the proposal explicitly pays heed to the principle of subsidiarity in the sense that Union law would only be triggered where the national law of the Member States falls short. The possibility cannot be excluded, therefore, that the Court will be willing to embrace the approach just discussed in a future case. In this connection it must be remarked that the solution adopted by the Court in *Ruiz*

---

293 This is, of course, an oversimplification of the argument. AG Poiares Maduro explicitly points out that the mere fact that a situation arises from the limited scope of application of Union law is *not* sufficient to trigger the application of Union law. In this connection, he points out that in the situation described the principle of equal treatment is violated. Still, to some extent this argument appears to rely on the limited scope of application of the Union principle of equal treatment in order to justify an enlarged application of that principle. In this connection, it is certainly worth remarking that the Court in its judgment in the *Carbonati Apuani* case did not take over the suggestions from AG Poiares Maduro (ECJ, Case C-72/03 *Carbonati Apuani* [2004] E.C.R. I-8027).

294 Such will normally only be the case where a national measure requires a Union citizen to leave the territory of the Union. See the detailed discussion under III.B.4., *infra*.

295 See Article 67(1) TFEU.

296 The most important innovations introduced by the Lisbon Treaty are certainly the fact that the Charter of Fundamental Rights obtained legal value and the possibility for the Union to accede to the ECHR. See the discussion in Cambien and Roes, "Het Verdrag van Lissabon: *anywhere as long as it's forward*?" (2010) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 195-206.

Zambrano does not provide a remedy in a case where a static adult Union citizen were refused the right to be joined by a non-EU family member.[297] In such a case, the second proposal by AG Sharpston could provide a more satisfactory solution. On the facts of *McCarthy*, for instance, it may be argued that the Court would have come to a different conclusion had it based its reasoning on Articles 18 and 21 TFEU, in line with the second proposal of AG Sharpston.[298]

4. Article 20 TFEU

In *Ruiz Zambrano* the Court accepted for the first time that Article 20 TFEU precludes Member States from adopting certain measures even with regard to static Union citizens. Accordingly, the Court appears to have accepted that Union citizenship and the rights attached thereto can in certain circumstances provide a sufficient link with Union law, regardless of any inter-State element. This constitutes a very significant change in the case law on Union citizenship because it entails a broader interpretation of the scope of Union law than was traditionally accepted. The Court confirmed and to some extent further clarified this approach in its more cent judgment in *McCarthy*.[299]

The consequence is that it is now accepted that Union citizenship can provide a sufficient link with Union law in certain circumstances. However, it should be emphasised from the outset that it would be wrong to read the said cases as stating that Union citizenship, in accordance with Article 20 TFEU, will henceforth in all circumstances constitute a sufficient link with Union law[300] and that, consequently, reverse discrimination of Union citizens is henceforth no longer tolerated by Union law.[301] That interpretation is clearly at odds with the outcome in *McCarthy*, in which the Court held that Union law was not applicable in the circumstances of the case. The judgments should presumably be read as holding that (static) Union citizens can rely on Union law against national decisions that deprive them of the genuine

297 See the discussion under III.B.4.a., *infra*).

298 This would, of course, depend on the assessment of whether the refusal of a right of residence to the husband of Mrs. McCarthy violated Article 8 ECHR (that possibility could not entirely be ruled out according to AG Kokott: Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] E.C.R. nyr, paras 59-60).

299 Although in *McCarthy,* the Court based this reasoning on Article 21 TFEU. I will explain below that the reasoning adopted in both cases is essentially the same and that Article 20 TFEU should be seen as the more general preferred legal basis for this approach.

300 Under that interpretation, the said judgments would, in addition, clarify that Member States are precluded from depriving Union citizens from the genuine enjoyment of the substance of their citizenship rights. That prohibition would serves, on that interpretation of the judgment, as a limitation to the powers of the Member State where they act within the scope of Union law.

301 See, in that sense, X, "La Cour franchit le Rubicon. Citoyen: la fin des situations purement internes" (2011) *Journal du Marché Intérieur*, *available at* http://jmieurope.typepad.com/jmi/2011/03/la-cour-franchit-le-rubicon-citoyen-la-fin-des-situations-purement-internes.html (although preceding the *McCarthy* judgment). To be precise, taking the view that Union citizenship will henceforth constitute a sufficient link with Union law does not necessarily mean that one agrees that the possibility for reverse discrimination of Union citizens has been abolished. One could take the view that *Ruiz Zambrano* implies that Member States have a greater margin of appreciation with regard to static Union citizens than with regard to other Union citizens, since only Member State decisions that deprive static Union citizens of the genuine enjoyment of the substance of their citizenship rights would be prohibited by Union law.

enjoyment of their citizenship rights.[302] Consequently, Union citizenship will provide a sufficient link with Union law only in circumstances where a Member State measure would have the effect of depriving a Union citizen of the genuine enjoyment of the substance of his citizenship rights. Accordingly, the classification of a Member State measure as a measure entailing such deprivation serves to define the scope of Union law rather than the scope of the powers of the Member States in situations coming within the scope of Union law.

This rather restrictive reading of the judgment is consistent with the *Rottmann* judgment, on which the Court relied to support its point. In fact, the Court's holding in *Ruiz Zambrano* that Article 20 TFEU precludes measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of their rights is followed by "see, to that effect, *Rottmann*, paragraph 42".[303] That paragraph of the *Rottmann* judgment is concerned with the scope of Union law and not with limitations deriving from Union law, as I have explained in great detail in Chapter I. In that paragraph, the Court held that a withdrawal decision fell within the scope of Union law "by reason of its nature and its consequences". The reason was that the decision entailed for the person concerned the loss of Union citizenship and the possibility to exercise the rights associated therewith throughout the Union. It is clear that the Court aligned its decision in *Ruiz Zambrano* on this latter aspect, namely the consequences of the national decision. Just like the withdrawal decision in *Rottmann*, the Belgian decisions in *Ruiz Zambrano* would render the Union citizens in question unable to exercise their citizenship rights. In drawing this parallel, the Court was clearly inspired by the Opinion of AG Sharpston, who also relied on *Rottmann* in order to argue that the situation of Mr. Ruiz Zambrano and his children fell within the scope of Union law,[304] although the AG connected this reasoning to Article 21 TFEU.

In the following, I will try to determine the scope of the said judgments and their likely consequences with as much precision as possible. Below I will evaluate whether the Court's judgment provides a welcome new approach to the wholly internal rule. By way of a general remark it must be pointed out that the judgments, in particular the one in *Ruiz Zambrano*, are remarkably brief and the Court's reasoning remarkably succinct. Consequently, it is sometimes difficult to ascertain the precise reasoning followed and the consequences of the judgments for the applicability of Union law in the future.

---

302 In *McCarthy*, the Court additionally made reference to impediments to the right to free movement. As I will explain below, impediment to the right to free movement should be seen as a specific instance of measures depriving a Union citizen of the genuine enjoyment of his citizenship rights.

303 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 42. That paragraph was, in turn, referred to by the Court in *McCarthy* (ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 47).

304 See Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 93-97. The AG explicitly took over the famous wording of paragraph 42 of *Rottmann*, holding that the situation of Mr. Ruiz Zambrano and his children fell "by reason of its nature and its consequences" within the scope of Union law. I do not think this was entirely appropriate, since, as I explained in Chapter 2 the term "nature" in *Rottmann* most probably referred to the status of Union citizenship. This status was not as such affected in *Ruiz Zambrano*. Therefore it would seem more appropriate to hold that the situation fell within the scope of Union law only because of its consequences.

a) Analysis

i) Substance of citizenship rights

The first issue to determine is what exactly is meant by the expression "substance of citizenship rights". Unlike AG Sharpston, who connected the parallel with *Rottmann* explicitly to the loss of the right to free movement and residence, the Court did not explain what rights it was referring to. *Prima facie* the most plausible interpretation of the phrase is that the Court referred first and foremost to the rights listed in Article 20(2) TFEU. As was discussed elsewhere,[305] at least some of these rights can only be exercised in the territory of the Member States. Consequently, national decisions forcing a Union citizen to leave the territory of the Union would make it impossible indeed to exercise those rights. Moreover, the reference to the "substance" of these rights seems to indicate that the Court was concerned not just with any of these rights, but with the most important of them.[306]

It cannot be disputed that the most important right in this connection is the right to free movement and residence laid down in Article 21 TFEU.[307] Besides, it should be clear that the whole claim of Mr. Ruiz Zambrano was precisely based on the Article 21 TFEU and the parallel reasoning in *Zhu and Chen.* In *McCarthy* the Court even explicitly mentioned impediments to the right to free movement in this connection. As I have argued above,[308] Article 21 TFEU can indeed be considered to be infringed where a Member State refuses a right of residence to a close non-EU family member of a static Union citizen. This will be the case where that national measure forces the Union citizen concerned to leave the territory of the Union and thereby hinders the potential future exercise of the right to move between Member States. Such will only be the case where the Union citizen concerned does not have the means to establish a connection with another Member State and thereby bring his situation within the scope of Union law.[309]

Still, it would be wrong to limit the reference to the substance of the rights associated with the status of Union citizen to the right to free movement. If that were the case, the Court would presumably have mentioned it explicitly in *Ruiz Zambrano* and there would have been no need for the Court to make an explicit distinction in *McCarthy* between national measures depriving a Union citizen of the enjoyment of his citizenship rights and national measures impeding the exercise of the right to free

---

305 See the discussion in Chapter 3, *supra*.

306 Such is perhaps more clear from other language versions of the *Ruiz Zambrano* and *McCarthy* judgments. The Dutch version employs the expression "de belangrijkste aan de status van burger van de Unie ontleende rechten", the German version the expression "Kernbestands der Rechte die ihnen der Unionsbürgerstatus verleiht" and the French version the expression "l'essentiel des droits attachés au statut de citoyen de l'Union".

307 It is clear from the case law of the Court that this is the most important of the rights listed in Article 20(2) TFEU. The right to free movement is moreover the right that enables Union citizens to go to another Member State in the first place, where they could then exercise other Union citizenship rights.

308 See under III.B.2.b., *supra*.

309 In *Ruiz Zambrano* such was arguably the case. This may explain the Court's insistence on the fact that the Belgian refusal of a work permit would leave the family without sufficient resources and require them to leave to a third country.

movement. The other citizenship rights mentioned in Article 20(2) should probably also be taken into account. It can be argued, for instance, that Union citizens who are forced to reside abroad cannot meaningfully exercise – or not to the same extent as Union citizens residing in the Member States – for instance the right to apply to the Ombudsman or the right to participate in European parliamentary elections. The same is indubitably true for fundamental rights,[310] which can also in this context be considered as citizenship rights.[311]

The bottom-line is probably that the Court's reference to the substance of Union citizenship rights should normally be understood as a reference to a "package" or "bundle" of rights associated with Union citizenship. The right to free movement takes a prominent place in this connection. The *McCarthy* judgment appears to indicate that impediments to this right can be sufficient in order to trigger the application of Union law, whereas in other cases it will normally required that the genuine enjoyment of some of the most important citizenship rights is impeded. In this connection it must be pointed out that the Court seems not to have been concerned just with immediate and direct restrictions to the exercise of citizenship rights, but also with restrictions to the potential or future exercise of citizenship rights. In this light, the Court's *Ruiz Zambrano* judgment becomes convincing. Indeed, by forcing the children of Mr. Ruiz Zambrano to leave the territory of the Union, the Belgian refusal decisions would in fact make it impossible for them to grow up in

310 On the facts of *Ruiz Zambrano*, the Belgian refusal decisions would arguably restrict the enjoyment of fundamental rights, by forcing Union citizens to move to a third country with a potentially lesser level of fundamental rights protection, or even violate them (see the Opinion of AG Sharpston, in which the AG argued that the right to respect for family life was probably violated by the Belgian refusal decisions (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 54-66)). See also the Opinion of AG Kokott in *McCarthy*, in which she considered that the contested decisions possibly violated Article 8 ECHR (Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] E.C.R. nyr, paras 59-60). It is striking that, unlike the Advocates-General, the Court did not make explicit reference to fundamental rights in *Ruiz Zambrano* nor in *McCarthy*. Perhaps the Court did not wish to single out fundamental rights as one citizenship right. Van der Mei, van den Bogaert en de Groot suggest that the Court was perhaps reluctant to refer to fundamental rights given that the material facts took place before the entry into force of the Charter of Fundamental Rights as a source of primary Union law (van der Mei, van den Bogaert and de Groot, "De arresten Ruiz Zambrano en McCarthy - Het Hof van Justitie en het effectieve genot van EU-burgerschapsrechten", (2011) *N.T.E.R.,* 196-197) and given the absence of an established link with Union law on the facts of the case. In my view this is not wholly convincing because the Court could well have drawn on other sources of fundamdntal rights, such as the ECHR – as the said authors rightly observe.

311 Admittedly, fundamental rights are also enjoyed by third country nationals in the Union, but the same is true for some of the citizenship rights mentioned in Article 20(2) TFEU. Fundamental rights are often considered to be Union citizenship rights. This view is perfectly illustrated by the famous Opinion of AG Jacobs in *Konstantinidis*, in which the AG held: "In my opinion, a [Union] national who goes to another Member State as a worker or self-employed person […] is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European [Union], he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say 'civis europeus sum' and to invoke that status in order to oppose any violation of his fundamental rights" (Opinion of AG Jacobs in Case C-168/91 *Konstantinidis* [1993] E.C.R. I-1191, para. 46). The link between Union citizenship and fundamental rights is also explicit in the Union Charter of Fundamental Rights (see, in particular, Title V of the Charter, entitled "Citizens' Rights"). For some critical views on this linking, see Besson and Utzinger, "Introduction: Future Challenges of European Citizenship - Facing a Wide-Open Pandora's Box" (2007) 13 *E.L.J.*, 578.

Belgium and get educated there in the local language and nurtured in the local culture.[312] Thereby they would fail to develop the potential of their Union citizenship, which would enable them to meaningfully exercise the rights associated with that status at a later stage, such as the right to participate in European elections for instance. As such, the Belgian decisions would effectively deprive them of the genuine enjoyment of the substance of their citizenship rights.

ii) Article 20 TFEU vs Article 21 TFEU

As was remarked higher, the Court in *McCarthy* repeated its holding in *Ruiz Zambrano* that national measures having the effect of depriving a Union citizen of the genuine enjoyment of the substance of his citizenship rights fall within the scope of Union law. It did so, however, with two remarkable differences. In the first place, the Court based its decision in *McCarthy* on Article 21 TFEU rather than on Article 20 TFEU. In the second place, it stated that not only national measures depriving a (static) Union citizen of the genuine enjoyment of his citizenship rights fall within the scope of Union law, but added that the same is true for national measures impeding the exercise of the right to free movement within the territory of the Member States.

These differences can presumably be explained by the fact that in *McCarthy* the Court was asked by the referring court to clarify the scope of the right to free movement. Moreover, given that the case concerned a Union citizen possessing dual nationality, the Court inevitably had to clarify its *Garcia Avello* judgment, which – according to the Court's current reading – also concerned the right to free movement.[313] Besides, the right to free movement can probably be qualified as the most important citizenship right. As was explained above, impediments to this right should probably be seen as a specific instance of measures depriving a Union citizen of the genuine enjoyment of one of his citizenship rights. The explicit reference to this right may indicate that the Court is of the opinion that impediments to the exercise of this right can suffice in order to bring a situation within the scope of Union law. For other, less important Union citizenship rights such will not necessarily be the case.[314]

Nevertheless, the said differences between *Ruiz Zambrano* and *McCarthy* give rise to confusion with regard to the precise relationship between Articles 20 TFEU and 21 TFEU. It would be preferable therefore if the Court would base its holding regarding national measures depriving a Union citizen of the genuine enjoyment of his citizenship rights consistently on Article 20 TFEU. Article 20 TFEU is a more satisfactory legal basis given that Article 20(2) TFEU lists the various citizenship rights. Where relevant, the Court can, of course, add Article 21 TFEU as a legal basis, plus an explicit reference to impediments to the right to free movement.

312 See also Hailbronner and Thym, who state that "during the identity-shaping ealy years of their lives, EU citizens should not be obliged to leave the Member States and so be socialized outside Europe for the sole reason of their parents' residence status" (Hailbronner and Thym, "Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011", (2011) 48 *CML Rev.,* 1268).

313 The questions referred concerned the provisions of Directive 2004/38 only, but the Court reformulated these questions so as to include both Directive 2004/38 and Article 21 TFEU (see explicitly ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., paras 24-26).

314 See the discussion under III.B.4.A.1., *supra*.

Besides, Article 20 TFEU is a more satisfactory legal basis from a more systematic point of view. As was pointed out already, the Court supported its holding in *Ruiz Zambrano* with an explicit reference to its judgment in *Rottmann*. Accordingly, the Court drew a parallel between national measures entailing the loss of Union citizenship and the rights attached to it and national measures entailing the loss of the possibility to genuinely exercise these rights. On this ground too, it would seem preferable to ground both holdings firmly in Article 20 TFEU.

iii) Genuine enjoyment

Now that I have established the likely meaning of the substance of citizenship rights, it should be considered what is meant by the "genuine enjoyment" of these rights. In *Ruiz Zambrano*, the Court ruled that the contested Belgian decisions had the effect of depriving the Union citizens concerned of that genuine enjoyment. The reason for this holding was, as explained higher, that they would force the children to leave the territory of the Union, given that they could not reside there independently on account of their young age. The question arises how material the young age of the children was in reaching this decision. Would the Court have come to the same conclusion if the case had concerned older children who could strictly speaking have resided independently in the Member States? The same question arises in the case of static adult Union citizens who would invoke Union law in order to claim a right of residence for their third-country spouse or dependent ascendant. On the one hand, older Union citizens could reside independently in the Member States and a refusal of a residence right to their family member would not therefore force them to leave the territory of the Union, at least not in theory. On the other hand, it cannot be ruled out that older Union citizens too may *de facto* be obliged to leave for a third country if they are not allowed to live in their Member State together with their close family member.[315] Much will depend, therefore, on how strict the term "genuine enjoyment" is interpreted by the Court.

The *McCarthy* judgment gives a very strong indication that the Court is of the opinion that a refusal of a right of residence to a family member can only in the case of young Union citizens be considered as a national measure depriving a person of the genuine enjoyment of his citizenship rights. The impossibility for Mrs. McCarthy to be joined by her husband, by contrast, did not have this consequence because it did not oblige her to leave the territory of the Union.[316] Consequently, the Court appears to limit its extensive interpretation of Article 20 TFEU to children who face the impossibility to be joined by their parent or, arguably, their primary carer.[317] This is in line with earlier cases, in which the impossibility for children to reside independently in a Member State appears to have inspired the Court to recognise for their family members more extensive rights than those enjoyed by family members of other Union citizens.[318] Still, it must be wondered whether the Court, in taking this position, is not

315 This possibility was acknowledged by the Court in *Metock and Others* with regard to moving Union citizens (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 89). The same, arguably, applies to static Union citizens who do not have the means to move to another Member State.

316 ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 50.

317 See under III.B.4.b., *infra*.

318 See, most recently, cases *Ibrahim* and *Teixeira* and the discussion in Chapter 5, *infra*.

focussing too much on what is possible in theory. Adult Union citizens who are refused the right to live with their spouse will in many circumstances *de facto* be forced to join their spouse in a third country. The distinction between children and other Union citizens on this point is not wholly satisfactory therefore. At least in those circumstances where the refusal of a residence right to the close family member of a static adult Union citizen would amount to a violation of fundamental rights, reliance on the *Ruiz Zambrano* case law should be possible. It is to be hoped that future case law will further clarify this point.

iv) Scope for justification

If my reading of the *Ruiz Zambrano* judgment is correct, Article 20 TFEU was relied on by the Court to bring the situation of Mr. Ruiz Zambrano and his children within the scope of Union law. The immediate consequence of this would be that decisions taken vis-à-vis them had to be in accordance with Union law. The Court rather swiftly decided that the disputed Belgian decisions were not in accordance with Union law since they violated Article 20 TFEU by making it impossible to genuinely enjoy the substance of their citizenship rights. Thereby, the Court seems to have used Article 20 TFEU both as a linking factor to Union law as well as a limitation deriving from Union law. That approach is not entirely coherent. In my view, the Court should better have followed its more elaborate reasoning in *Rottmann*. In *Rottmann*, the Court first considered that the disputed withdrawal decision fell within the scope of Union law and next considered what limitations deriving from Union law the Member State in question, therefore, had to abide by. The most important such limitation was found by the Court to be the principle of proportionality.[319] Under that principle, the Member State's interests have to be balanced against the interest of the Union citizen concerned. Overarching Member State interests can, accordingly, justify restrictive measures vis-à-vis a Union citizen.

It seems to me that this reasoning could have been readily transposed to the *Ruiz Zambrano* case. In fact, the compliance of the Belgian refusal decisions with the principle of proportionality was explicitly considered by AG Sharpston, be it in relation to Article 21 TFEU. The AG considered that, in order to assess the validity of the refusal of a residence permit, Belgium's interest in applying its immigration laws and protecting itself against unreasonable financial burdens would have to be balanced against the consequences it would entail for Mr. Ruiz Zambrano's children and their family members. The AG estimated that the balance would probably tilt in favour of the Ruiz Zambrano family, considering *inter alia* that the family was well integrated and that Mr. Ruiz Zambrano had in the past significantly and regularly contributed to the Belgian public finances.[320]

It is regrettable that the Court did not follow the same clear steps in *Ruiz Zambrano* as it did in *Rottmann*.[321] This lack of logical clarity makes the judgment rather difficult

---

319 As I have discussed in detail in Chapter 2, other Union law principles could also serve as such limitations. See in this regard also Opinion of AG Poiares Maduro in Case C-135/08 *Rottmann* [2010] E.C.R. I-1449.

320 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 109-121.

321 In the *McCarthy* judgment the question regarding possible justifications did obviously not arise, since the Court held that Union law was not applicable to the facts of the case.

to understand. Maybe the judgment should be read as holding that a deprivation of the genuine enjoyment of the substance of citizenship rights can never be justified. However, that would seem illogical in relation to the *Rottmann* judgment. If a withdrawal of nationality and Union citizenship can be justified, then *a fortiori*, the deprivation of the enjoyment of some of the rights associated with Union citizenship should be open to justification.[322] Moreover, it cannot realistically be disputed that Member States may have legitimate reasons for refusing a right of residence to the third-country family members of a Union citizen which override the interests of that Union citizen in enjoying his rights.[323] Given that such is true with regard to the rights enjoyed by family members of moving citizens, it could not be seen why such would not be true in cases where the link with Union law was provided by Article 20 TFEU. Otherwise, certain categories of static Union citizens and their family members would suddenly enjoy greater protection under Union law than other family members. Perhaps the Court in *Ruiz Zambrano* merely considered that the Belgian refusal decisions could not be justified in the particular circumstances of the case before it.[324] It would have been beneficial to the clarity of the judgment then if the Court had explicitly said so. That would have provided the judgment with a stronger analytical framework and would have shaped more legal certainty and predictability for future cases.[325] It would also have done more justice to the division of powers between the Union and the Member States because the interests of the Member States *inter alia* in pursuing an effective immigration policy would have explicitly been taken into account.

A related question that can be asked in this connection is whether Member States can subject the right to family reunification of static Union citizens, based on Article 20 TFEU, to the condition of self-sufficiency. *Prima facie*, this question has to be answered in the negative, as the condition of self-sufficiency is contained in Directive 2004/38, which does not apply to static Union citizens. Still, *Ruiz Zambrano* provides some support for an affirmative answer. Indeed, *Ruiz Zambrano* makes it clear that Member States may not only not refuse a residence permit to the non-EU parent of a young Union citizen. They may also not refuse him or her a work permit if such refusal would make it impossible for him or her to provide for his or her family. This

322 It must be remarked in this regard that in *McCarthy* the Court referred approvingly referred to *Grunkin and Paul*, while explicitly mentioning the possibility of justifying obstacles to free movement on the basis of objective considerations and in a way proportionate to the legitimate aim pursued (ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 52).

323 This should, in accordance with the *Metock and Others* judgment, be true at least for reasons of public policy, public security or public health or in case of abuse of rights. See also under III.B.4.b., *infra*.

324 Another reason that may explain why the Court did not consider possible justifications is of a more procedural nature: it appears that the Belgian government had not put forward any such justifications. Still, it would have been beneficial for the conceptual clarity of the judgment if the Court had raised the issue of justifications *proprio motu.* See also on this point, Hailbronner and Thym (n. 312, *supra*), at 1266.

325 Admittedly, the Court may not have referred to the principle of proportionality, precisely because the assessment of that principle would have reverted to the national court, creating a less certain outcome of the case. This was indeed an important criticism of the *Rottmann* case (see, *inter alia*, Kochenov, "Case C-135/08 *Janko Rottmann* v. *Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported" (2010) 47 *CML Rev.,* 1831-1846). Still I do not consider this consideration to be persuasive ground to forego any consideration of the interests of the Member State concerned in adopting the contested decision. Moreover, there was nothing that precluded the Court from carrying out the assessment of the principle of proportionality itself.

in itself is rather logical: the very recognition of a residence right for the parent of young Union citizens is based on the idea that such is necessary to safeguard the genuine enjoyment of their citizenship rights. If Member States were obliged to grant a residence permit to that parent, but could at the same time refuse him or her a work permit, the *effet utile* of the rights of the Union children concerned could be put in peril. In essence, the Court is merely further equating here the situation of a static Union citizen to that of a moving Union citizen.[326] In stating this requirement, the Court in my view implicitly indicates that the Union citizen and his parent will only have a right of residence if the latter, being so enabled by his or her Member State of residence, does provide sufficient resources to support himself and his family members.[327] In other words, the classic condition of self-sufficiency to which residence in another Member State is subject,[328] should in my view also apply to static Union citizens. Admittedly, Directive 2004/38 is not applicable in such cases, but the parallel drawn with moving citizens, in the particular scenario of *Zhu and Chen* would so require.[329] This would arguably be different, however, in cases where the Union children would go to school, in view of the judgments in *Ibrahim* and *Teixeira*.[330]

b) Consequences

In order to evaluate the Court's judgments in *Ruiz Zambrano* and *McCarthy*, it is necessary to consider their consequences. If the judgments are interpreted as I have argued they should be, their consequences are limited to certain sets of circumstances, but at the same time significant. Put at its most simple, the judgments in fact extend the scope of the ruling in *Zhu and Chen* to situations which lack an inter-State element.[331] Accordingly, Member States must issue the parent of a young Union citizen resident in their territory with a residence permit, even where it concerns one of their nationals who has no link with any other Member State. As I have argued in chapter 4, there seems to be no convincing reason, moreover, to limit this reasoning to

---

326 Family members of a Union citizen coming within the scope of Union law do not require a work permit. AG Sharpston explicitly drew a parallel with that situation and the one at hand in *Ruiz Zambrano*. She submitted that if Mr. Ruiz Zambrano was held to enjoy a derivative right of residence based on the fact that his children are Union citizens, this "would arguably permit him to benefit, by necessary analogy, from the dispensation from the work permit requirement that is available, under Article 2(2)2º(b) of the Law of 30 April 1999, to *dependent* relatives in the ascending line of a Belgian national" (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 39).

327 In *Ruiz Zambrano,* such was arguably the case. In fact, Mr. Ruiz Zambrano had worked for more than five years and had paid the statutory social security contributions. Had he held a work permit, this would have entitled him later to unemployment benefits. Moreover, he would presumably have continued to work if he had been given a work permit; in that case he would not have been forced to quit his job after the inspection by the Belgian authorities.

328 By the condition of self-sufficiency in this context I mean that there must be sufficient resources for the Union citizen and his family members not to become a burden on the social system of their Member State of residence. These resources could derive from the economic activity of the non-EU parent of the Union citizen or from his savings.

329 The recognition of a right of residence in that case was dependent on the finding that baby Catherine and her mother had sufficient resources not to become a burden for the UK social system (see ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 28).

330 See the detailed discussion in Chapter 5, *infra*.

331 For a detailed analysis of the *Zhu and Chen* judgment and its impact on the immigration laws of the Member States, I refer to Chapter 5, *infra*.

the *parent* of a young Union citizen. Other categories of "primary carers" would arguably also qualify. Furthermore, the judgment in *Ruiz Zambrano*, arguably, indicates that multiple persons could derive a right of residence from their capacity as the primary carer of a young Union citizen.[332]

The bottom-line is that the judgments will further contribute to diminishing instances of reverse discrimination of Union citizens. In *Zhu and Chen* like situations, the existence of an inter-State element will no longer matter. In other circumstances, for instance where an adult static Union citizen wants to be joined by his spouse, the issue of reverse discrimination appears to be left unaffected by the judgments, although there are strong arguments to widen the current restrictive stance of the Court in this regard (see under III.B.4.a.iii., *supra*). At the same time, it is clear that the judgments will have significant consequences for the immigration policies of the Member States, as is clear from the above. In their most crude version, they oblige Member States to grant, in all circumstances, a residence permit to the parent of a child which obtained their nationality, even in situations formerly considered to be purely internal situations. The consequences of this should not be underestimated, since many young children of third country nationals will have acquired the nationality of the Member State of residence of their parent without having a link to any other Member State. Moreover, once a right of residence is recognised for the Union citizen and his parents, they can presumably rely on the Union principle of equal treatment, which entails financial burdens for their Member State of residence.

Nevertheless, the judgments arguably do leave some scope for the Member States to keep the grant of such residence rights within certain bounds. First of all, it must be emphasised that the children in *Ruiz Zambrano* were still very young. In line with what was already remarked, children of an older age who have always resided in the Member State of their nationality, can probably be expected to be able to exercise their citizenship rights independently.[333] Hence, they can presumably not rely on Union law to claim a right of residence for their parents. Second, Member States can arguably refuse a right of residence in the circumstances described where such is justified by legitimate reasons of an overriding public interest. As pointed out above, the judgment in *Ruiz Zambrano* does not explicitly support this view, but the judgment becomes much more coherent and consistent with earlier case law if read this way. If the parallel with moving Union citizens is drawn consistently, Member States may refuse a right of residence to the third country national parents of a static Union citizen on grounds of public policy, public security or public health or on ground of abuse of rights. Third, Member States may arguably subject the said right of residence to the condition of self-sufficiency. Such is arguably not possible only where the Union children are going to school. However, where in that case the Union citizen and his family members need to rely on the social assistance system of their Member State of residence, it might be argued that the Member State in question may

---

332 See the discussion in Chapter 5, *infra*.

333 In this connection, I refer to my analysis of the *Zhu and Chen* case in Chapter 5, *infra*. In my view, the Court in *Ruiz Zambrano* implicitly took over the reasoning followed in that case to the extent that it accepted that minor children cannot reside in a Member State independently from their parents, although in *Ruiz Zambrano* this impossibility impacted on the possibility to enjoy the ensemble of citizenship rights, rather than merely the exercise of the right to free movement.

restrict the said residence right to families which are sufficiently integrated in its society.[334]

Even if accepted, these limitations are rather limited in scope, especially because they need to be interpreted restrictively and applied in accordance with general principles of Union law.[335] It follows that Member States have only limited scope to rely on their immigration laws in order to refuse third country nationals a right of residence in the circumstances described. Indeed, the violation of the provisions of national immigration law in itself does not seem to be a ground for such a refusal. The ECJ in *Ruiz Zambrano* did not seem to consider it relevant that Mr. Ruiz Zambrano had overstayed his visa and had been residing illegally in Belgium as far as the Belgian immigration law provisions were concerned.[336] The likely reaction of the Member States will be to further tighten the conditions for the acquisition of their nationality.[337] Indeed, given that Member States are obliged to grant a right of residence to the non-EU parent of a young Union citizen, they have an incentive to make it more difficult for children of third country nationals to obtain their nationality, in order to avoid "activating" the *Ruiz Zambrano* case law.[338] In particular Member States with a form of *ius soli* based nationality[339] will be likely to tighten the conditions for the acquisition of their nationality by children of third-country nationals. Besides, it can be expected that Member States will become more insistent on using the possibilities for such children to acquire the nationality of a

---

334 I refer to my discussion in Chapter 5, *infra*, of the rights enjoyed by the primary carer of school-going children. That discussion, which concerns "moving" Union children, can apply by analogy to static Union children which fall within the scope of Union law on the basis of Article 20 TFEU. I further refer to the Opinion of AG Sharpston, who seems to have considered the degree of integration to be a potentially relevant factor for the rights enjoyed by the parent of a static Union citizen (Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 113).

335 The exceptions based on public policy, public security or public health and abuse of rights are interpreted narrowly in the case law of the ECJ. See the discussion under II.2.b., *supra*.

336 In this respect, the Court's judgment resembles its judgment in the *Carpenter* case (ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279). As was remarked above, the Member States could only rely on their immigration law to refuse a right of residence where such a refusal is based on grounds of public policy, public security or public health or on ground of abuse of rights. This is, again, consistent with *Carpenter*. In that case, the Court held that the fact that Mrs. Carpenter had violated the UK immigration provisions was not an insurmountable obstacle to her claim for a right of residence since "her conduct, since her arrival in the United Kingdom in September 1994, had not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety" (ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, para. 44).

337 See Hailbronner and Thym (n. 312, *supra*), at 1265 and Wiesbrock, "The Zambrano case: Relying on Union citizenship rights in 'internal situations'", *EUDO Citizenship Observatory*, available at http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations.

338 AG Sharpston openly admitted that the solution to the expected unwanted impact of the *Ruiz Zambrano* judgment (and the related fear for opening the "floodgates") is to amend the rules on the acquisition of nationality, although she added that it would be wrong to turn the European Union into "Fortress Europe" (see Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, 114-115).

339 See in this connection, Honohan, "Ius Soli Citizenship" (2010) *EUDO CITIZENSHIP Policy Brief No. 1,* available at http://eudo-citizenship.eu/policy-briefs.

third country and make the acquisition of their nationality dependent on the impossibility to do so.[340]

As such, the *Ruiz Zambrano* and *McCarthy* judgments may well have the somewhat paradoxical consequence that in the near future fewer persons will enjoy the rights associated with Union citizenship rather than more. Indeed, by being more generous towards the rights enjoyed by Union citizens, the Court may well have created an incentive for Member States to further restrict access to that status. This would have the effect of further increasing the "gap" between the rights enjoyed by Union citizens and those by third country nationals resident within the Union, which is frequently deplored in legal literature.[341] Such increased gap may well go counter to some of the explicitly stated objectives of the Union, as was remarked by AG Sharpston.[342] Moreover, it must be remarked that, since the *Rottmann* case, it is clear that even in the field of nationality Member States will have to exercise their competence in accordance with Union law. Refusing the acquisition of nationality to children of third country nationals may in certain circumstances hurt general principles of Union law such as the principle of proportionality or the principle of legitimate expectations.[343] This may well temper the unexpected consequences of the judgment just described.

5. Conclusion

In *Ruiz Zambrano* and *McCarthy* the Court has taken a significant step towards recognising Union citizenship, acquired in accordance with Article 20 TFEU, as a sufficient link with Union law. If my reading of the judgments is correct, this more flexible interpretation of the required link with Union law is at present valid only in *Zhu and Chen* like situations. In such situations, reverse discrimination of Union citizens appears no longer to be tolerated. Indeed, once static Union citizens come within the scope of Union law, the Court appears to assimilate their legal position to that of moving Union citizens. The crucial difference between static Union citizens and other Union citizens appears to be therefore, at least at present, that the situation of the former will come within the scope of Union law in limited circumstances only.

Of course, the possibility cannot be excluded that the Court will go further along this road in future cases and accept Union citizenship as a sufficient link with Union law in other circumstances too. If the Court is willing to go down this road, it would take

---

340 This is perfectly demonstrated by the amendment of Article 10 of the Belgian nationality code in 2006 (see Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 17), which can surely be explained by the occurrence of many cases with facts similar to those of *Ruiz Zambrano*. See the discussion in Foblets and Loones, "Het Wetboek van de Belgische nationaliteit andermaal herzien (2006): het parlement ontzien of gezien?" (2007) *T.Vreemd.*, 23-39. See also Maes, "Vreemdelingen zonder legaal verblijf met Belgische kinderen: uitzetting van onderdanen of beschermd gezinsleven als hefboom voor regelmatig verblijf" (2005) *T. Vreemd.*, 332-339.

341 See, for instance, Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights" (2009) 15 *Colum. J. Eur. L.*, 225 *et seq*; Besson and Utzinger, "Introduction: Future Challenges of European Citizenship - Facing a Wide-Open Pandora's Box" (2007) 13 *E.L.J.*, 581-582 and the literature referred to.

342 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 115.

343 I refer to the discussion in Chapter 2.

up the suggestion which has since long been put forward by a number of influential scholars that, in the current state of Union law, Union citizenship should in itself be considered as a sufficient link with Union law.[344] Such would make reverse discrimination of Union citizens impossible indeed, because static Union citizens would in all circumstances be able to rely on the Union principle of equal treatment to claim the same treatment as other Union citizens.

Nevertheless I believe the *Ruiz Zambrano* and *McCarthy* judgments should not be read as an announcement of such a wide construction of the scope of Union law in future case law. The judgments make clear that the Court favours a narrow interpretation of the circumstances in which Union citizenship will provide a sufficient link with Union law. The Court's finding in *Ruiz Zambrano* that Union law was applicable carries a particularly weighty justification in the sense that the Court was faced with a situation in which national measures had the effect of making the exercise of the most important citizenship rights – and, as I have argued the "activation" of a person's Union citizenship – impossible. In this sense, the judgment is merely an analogous application of the *Rottmann* judgment. In both cases, the Court essentially held that Member States may not, without due justification,[345] take measures which *de lege* or *de facto* "annihilate" a person's Union citizenship. Viewed in this light, the limited extension in the case law of the scope of application of Union law is highly convincing. Higher, I have argued that the limited extension of Article 18 TFEU proposed by AG Sharpston in her Opinion in *Ruiz Zambrano* has its merits too, given the particular significant value carried by fundamental rights. It is possible therefore that the Court will adopt this approach in a future case.

In other cases, which do not rest on the additional rationale of preventing the annihilation of an individual's Union citizenship and the associated rights or of protecting fundamental rights, treating Union citizenship as a sufficient link with Union law would be a particularly intrusive step, given the significant impact it would have on the competences of the Member States. Such would certainly be good for realising the full potential of Union citizenship, but it can be doubted whether the Court could legitimately take such a revolutionary step. It should, perhaps, preferably be taken by the Union legislator rather than by the Union Court.[346] Given that Article

---

344 See, *inter alia*, Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?" (2009) 34 *E.L. Rev.*, 447-450 (although noting that such a step would probably require intervention from the Union legislator first); Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 *CML Rev.*, 30 *et seq.*; White, "Free Movement, Equal Treatment, and Citizenship of the Union" (2005) *Int'l & Comp. L.Q.*, 901; Toner, "Judicial Interpretation of European Union Citizenship - Consolidation or Transformation" (2000) 7 *MJ*, 168-170; O'Leary *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), 278. See also the discussion in Nic Shuibhne, "Free movement of persons and the wholly internal rule: time to move on?" (2002) 39 *CML Rev.,* 731-771.

345 The possibility of justification is not mentioned explicitly in the *Ruiz Zambrano* judgment, but as I have argued above, it may have been implicitly there.

346 See Walter *Reverse Discrimination and Family Reunification* (Nijmegen, Wolf Legal Publishers, 2008), 60; Besson and Utzinger, "Introduction: Future Challenges of European Citizenship - Facing a Wide-Open Pandora's Box" (2007) 13 *E.L.J.,* 584 (cited by Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights" (2009) 15 *Colum. J. Eur. L.*, 213), who state: "…reverse discriminations are the very opposite of what is to be expected in an *isopoliteia*. If this negative impact on free

21 TFEU is explicitly made subject to the limitations and conditions laid down in secondary Union law, the Union legislator was arguably given an explicit authorisation by the Treaties to determine the scope of the right to free movement and residence and could on that ground arguably extend the right of residence enjoyed by Union citizens to static Union citizens. Accordingly, it could amend Article 3(1) of Directive 2004/38 to the effect that it would apply to all Union citizens "who move to or reside in a Member State".[347] As a consequence, the Directive, including the principle of equal treatment laid down in its Article 24, would also apply to static Union citizens.[348] It is unlikely that the Member States would agree to that, at least in the foreseeable future. That being the case, it is perhaps not for the Court to jam this extension "down their throat".

Another, more limited option would be to merely extend the rights relating to family reunification to static Union citizens. In a not so distant past, the Commission did in fact adopt a proposal to this effect.[349] An early Commission proposal for a family reunification directive stated in its Article 4:

> "By way of derogation from this Directive, the family reunification of third-country nationals who are family members of a citizen of the Union residing in the Member State of which he is a national and who has not exercised his right to free movement of persons, is governed *mutatis mutandis* by Articles 10, 11 and 12 of Council Regulation (EEC) No 1612/68 and by the other provisions of Community law listed in the Annex."[350]

The explanatory memorandum explained that the existing situation, subjecting static Union citizens to national rules, led to an unwarranted difference in treatment and that, given that "Union citizenship is indivisible", Union law should intervene so as to grant static Union citizens the benefit of Union rules relating to family reunification.[351] This part of the proposal never made it into law. The Commission

---

movement of people is supported, *harmonisation* might be the solution. Directive 2004/38/EC does not yet forbid reverse discrimination, but one may imagine doing so top-down in the near future".

347 This would at the same time entail a shift in the purposes pursued by Article 21 TFEU. Those purposes would no longer be limited to the ones described higher, for which movement between Member States was arguably a relevant element. The peaceful enjoyment of residence in the Member State of one's choice could be one of the purposes pursued by Article 21 TFEU if Directive 2004/38 would be modified as described.

348 See Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?" (2009) 34 *E.L. Rev.*, 450.

349 See Commission proposal on the right to family reunification, COM (1999) 638 final (published in [2000] O.J. C116E/66). The proposal is discussed in Walter *Reverse Discrimination and Family Reunification* (Nijmegen, Wolf Legal Publishers, 2008), 41-43 and Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, 761-762.

350 Article 1 of the Directive contained in the proposal stated: "The purpose of this Directive is to establish a right to family reunification for the benefit of third-country nationals residing lawfully in the territory of the Member States and citizens of the Union who do not exercise their right to free movement". Article 3 stated: "This Directive applies where the applicant for reunification is…(c) a citizen of the Union not exercising his right to free movement, if the applicant's family members are third-country nationals, irrespective of their legal status".

351 See also the ninth recital to the draft directive contained in the proposal, which states: "To avoid discriminating between citizens of the Union who exercise their right to free movement and those who do not, provision should be made for the family reunification of citizens of the Union residing in countries of which they are nationals to be governed by the rules of Community law relating to free movement".

deleted it in later versions of the proposal, stating that the alignment of the rights of all Union citizens to family reunification would be dealt with later, after the work on the Citizens' Directive (the eventual Directive 2004/38) would be finished.[352] Such has not happened so far.[353] Perhaps the recent developments relating to Union citizenship and recent case law of the ECJ could give a new impetus to the Union legislator to adopt new rules relating to family reunification.[354] To this purpose, the provisions of Directive 2004/38 relating to family members of Union citizens could be extended so as to cover also static Union citizens. The legal basis for this could presumably be Article 20 and 21 TFEU, which would thereby be given a wider interpretation than is currently the case.[355]

C. Clarifying the inter-State element

As pointed out higher, the orthodox approach to the link required with Union law leads to problems of reverse discrimination. As was argued under "B.", this problem could be solved by enlarging the scope of Union law and enabling Union citizens to rely on Union law in situations formerly considered to be purely internal ones. This seems to be the direction the Court is following in recent case law, with *Ruiz Zambrano* and *McCarthy* as its current apotheosis. However, it was also remarked that the extension of the scope of Union law in the recent case law of the Court is limited. If my reading of the said cases is correct, Article 20 TFEU can provide a direct link with Union law only in cases where a Union citizen is faced with a national measure making it impossible to genuinely enjoy the substance of his or her citizenship rights. This covers only a limited number of national measures in a limited number of circumstances.

The immediate consequence is that, in other circumstances, the Court's traditional case law on Union citizenship, requiring an inter-State element, still stands. Consequently, certain Union citizens will still not be able to rely on Union law in those circumstances and reverse discrimination of Union citizens thus remains a problem, particularly as regards family reunification. As I have argued higher, the possibility for reverse discrimination is in fact inherent in the current Union legal

352 Amended proposal for a Council Directive on the right to family reunification, COM(2002) 225 final: see the explanatory memorandum under 2.4.

353 This was confirmed by the Commission in its 2008 Report on the application of Directive 2003/86 (Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86 on the Right to Family Reunification, COM(2008) 610 final). The Report states, under point 4, that "family reunification of Union citizens residing in the Member State of their nationality is not subject to [Union] law".

354 Some additional support for the desirability of this could be found in the fact that Directive 2003/86 grants third country nationals a right to family reunification irrespective of whether they have moved between Member States. The limited parallelism between Directives 2003/86 and 2004/38, accepted by the Court in *Metock and Others* (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 69) could be seen as an additional argument for extending the right to family reunification to static Union citizens.

355 The Treaty provisions on Union citizenship would be a more convincing legal basis for this than the provisions formerly contained in Title IV of the EC Treaty (see now Title V of the TFEU), as was remarked by Nic Shuibhne (Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, 762).

framework and could only be abolished after intervention of the Union legislator.[356] As I have explained, the justification for a difference in treatment between Union citizens who have moved[357] and those who have not is that only the former have contributed to the aims of the free movement provisions, such as fostering social cohesion and political integration.[358] This explains, for instance, why a Union citizen who has moved to another Member State may upon his return to the home Member State claim the Union rights relating to family reunification, in contrast to a static compatriot.[359] As remarked higher, this point of view is consistent with the Court's case law on Article 21 TFEU and the underlying intentions of the Member States, as apparent from Directive 2004/38.

If that view is accepted, it is important, of course, that it can be determined with certainty how much "movement" is required for a Union citizen in order to be able to invoke Article 21 TFEU against his own Member State.[360] The Court's case law on this point is seriously lacking in clarity. As Van Elsuwege and Adam have observed, it is "not entirely clear *what kind* of movement should be exercised, *when* that exercise should have happened and for *how long* a cross-border element should exist".[361] Different ECJ judgments give rise to different conclusions on this point. On the one end of the spectrum, there are cases in which the Court has held that

---

356 Another option, which is not the focus of the present analysis, is for the Member States to extend the benefits conferred by Union law on moving Union citizens to static Union citizens, in line with the suggestion of the Court in ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 40.

357 In this context, I consider static Union citizens with a dual nationality as moving Union citizens, since their position can be assimilated to that of an incoming Union citizen of another Member State.

358 Cloots has criticized this point in relation to the Court's judgment in the *Flemish Care Insurance* case. The author questions the very relevance of the criterion of "having exercised one's right to free movement within the EU" as a trigger for the applicability of Union law (Cloots, "Germs of Pluralist Judicial Adjudication: *Advocaten voor de Wereld* and Other References from the Belgian Constitutional Court " (2010) *CML Rev.*, 661-662). I do not share this criticism. As I have stated higher, Union citizens who have exercised their free movement rights have contributed to the aims of the Union and have thereby brought themselves within the scope of Union law. They should therefore be able to rely on the rights conferred by Union law and their status should be equated to that of Union citizens coming from other Member States.

359 This should not be taken to mean that the right of residence of a returning Union citizen in his home Member State is made subject to the conditions of Directive 2004/38. As the Court explained in *McCarthy*, such would be in violation of international law. Rather the fact that a Union citizen has moved allows him to claim the benefits of Union law in his home Member State, including the right to be treated equally as Union citizens from other Member States, for instance with regard to family reunification.

360 The question that concerns me here is not whether a Union citizen can rely on Union law in another Member State. That question was discussed under "II". It is rather *when* a Union citizen has established a sufficient connection with another Member State in order to rely on Union law vis-à-vis his own Member State. Specifically in relation to family reunification, it is clear that a Union citizen who resides in another Member State should have the right there to be joined by family members (see the discussion on *Metock and Others* under II.B., *supra*). The question I am concerned with here is whether a Union citizen who has resided in another Member State, then returns to his home Member State and subsequently wants to be joined there by family members, can rely on Union law for that purpose and under what conditions.

361 Van Elsuwege and Adam, "The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination (Case note: Constitutional Court, Judgment 11/2009 of 21 January 2009)" (2009) 5 *EuConst*, 334, citing the discussion of this issue in Martin, "Comments on Gouvernement de la Communauté française and Gouvernement wallon (Case C-212/06 of 1 April 2008) and Eind (Case C-291/05 of 11 December 2007)" (2008) 10 *Eur. J. Migration & L.*, 372.

receiving services in another Member State is sufficient in order to bring a person within the scope of Union law.[362] Also the occasional provision of services to persons in other Member States seems sufficient to bring a Union citizen within the scope of Union law.[363] In this connection, it is not even required that either the recipient or the provider of services moves to another Member State, since "cross-border" services are caught by the provisions on the freedom to provide services.[364] Besides, there is a consistent set of cases in which the Court has held that "lawful residence" in another Member State brings a Union citizen within the scope of Union law.[365] In other cases, merely "moving" or "travelling" to another Member State appears sufficient for this purpose.[366] In other cases still, even moving or travelling between Member States is not required.[367] On the other end, there are cases in which the Court appears to be more demanding, by requiring more than lawful residence in another Member State,[368] or renders a judgment that is silent on the issue and can be so interpreted.[369]

---

362 See, *e.g.*, ECJ, Case 186/87 *Cowan* [1989] E.C.R. 195, para. 17; ECJ, Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637, para. 15 (Union law covers Union citizens who "visit another Member State where they intend or are likely to receive services").

363 See ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, paras 29-30.

364 See, *e.g.*, ECJ, Case C-384/93 *Alpine Investments* [1995] E.C.R. I-1141, paras 15 and 20 to 22.

365 See, *e.g.*, ECJ, Case C-85/96 *Martínez Sala* [1998] E.C.R. I-2691, para. 61. In the *Schempp* case, the Court even considered it sufficient that the spouse of a Union citizen had established her residence in another Member State (ECJ, Case C-403/03 *Schempp* [2005] E.C.R. I-6421, paras 23-25). Similarly, in earlier case law, the Court found that the fact that a dependent family member lived in another Member State sufficed in order to bring a Union citizen within the scope of Union law (see ECJ, Case C-255/99 *Humer* [2002] E.C.R. I-1205, para. 48).

366 See, *e.g.*, ECJ, Case C-378/97 *Wijsenbeek* [1999] E.C.R. I-6207, paras 20-22 (taking a flight from an airport of another Member State considered sufficient in order to fall within the scope of Union law).

367 I refer to case *Zhu and Chen*. As I have argued higher, the Court in this case apparently relied on the specific circumstance that the individual concerned possessed the nationality of another Member State than her Member State of residence in order to assimilate her situation to that of moving Union citizens.

368 In the *Flemish Care Insurance* case, for instance, the Court did not specify what exercise of free movement rights was required in order to bring the situations concerned within the scope of Union law. Some have questioned whether prior movement by Belgian nationals for non-economic purposes would also bring them within the scope of Union law (Verschueren, "Europese krijtlijnen voor een sociaal federalisme", in Cantillon, Popelier and Mussche (eds.), *Naar een Vlaamse sociale bescherming in België en Europa?* (Antwerp-Oxford, Intersentia, 2010), 248). The Flemish legislator has esteemed that such was not sufficient. The new, amended, version of the Flemish care insurance scheme includes within its scope those persons who live in the French speaking part of Belgium, work in Flanders or Brussels and have made use of the right of free movement of workers or the freedom of establishment (see Article 4(2) of the Care Insurance Decree, as modified by Decreet Vlaams Parlement van 30 april 2009 tot wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering (*Moniteur belge* of 28 May 2009)). In my view, this amendment is too narrow in scope since prior movement to another Member State for non-economic purposes should also be considered sufficient to trigger the applicability of Union law (see in this sense, van der Steen, "Zuiver interne situaties: geen omwenteling, wel inperking" (2008) *N.T.E.R.*, 306).

369 A good example is the *Werner* case, in which the Court held that mere residence in another Member State was not sufficient in order to bring a Union citizen within the scope of Union law (ECJ, Case C-112/91 *Werner* [1993] E.C.R. I-429; see also ECJ, Case C-293/03 *My* [2004] E.C.R. I-12013). Admittedly, that case law was concerned with economically active Union citizens and seems, moreover, to have been reversed by the ECJ in recent years (see the detailed discussion in Tryfonidou, "In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?" (2009) 46 *CML Rev.,* 1591-1620).

This case law leads to legal uncertainty[370] and thereby makes it difficult for Union citizens to determine whether they could or should take steps to bring themselves within the scope of Union law in order to rely on the rights conferred on Union citizens. This situation deters the effective exercise of citizenship rights and the "activation" of Union citizenship. If it is sufficient to receive services in another Member State, establishing a link with Union law would be very easy.[371] As AG Sharpston explained in *Ruiz Zambrano* it would appear to be sufficient then that a friendly neighbour had taken Mr. Ruiz Zambrano's children on a visit or two to Parc Astérix in Paris, or to the seaside in Brittany in order to bring their situation within the scope of Union law.[372] On this broad interpretation of the scope of Union law, almost all Union citizens could avail themselves of the rights of Union law.[373] At the same time, questions could arise as to the appropriateness of the receipt of services as a trigger for the applicability of Union law and as to the arbitrariness of excluding Union citizens who do not demonstrate this element. If a more significant inter-State element were required, establishing a link with Union law would become more difficult. Here, the trigger for the applicability of Union law would require a more meaningful contribution to the aims of a Citizens' Europe. At the same time, it could lead to a concern, voiced by some scholars, that only Union citizens wealthy enough to establish a link with Union law could avail themselves of the benefits of Union law, such as the rights relating to family reunification.[374]

Besides creating legal uncertainty, the recent case law of the ECJ has been criticized for leading to arbitrary results.[375] It has been noted that it is precisely the relative ease with which a link with Union law can be established which makes it even harder to

---

370 As many authors have emphasized: see, *inter alia*, Van Elsuwege and Adam, "The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination (Case note: Constitutional Court, Judgment 11/2009 of 21 January 2009)" (2009) 5 *EuConst*, 333-334; Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?" (2009) 34 *E.L. Rev.*, 444-445; Van Elsuwege and Adam, "Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance flamande" (2008) *C.D.E.*, 677-678; Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, 745.

371 This point was clearly articulated in the arguments advanced by the defendants in the *Angonese* case against this broad interpretation of the scope of Union law: "Otherwise, short educational exchanges or even periods of as little as one day spent abroad as a tourist could, quite arbitrarily, enable a person to invoke [Union]-law rights against his own Member State" (see Opinion of AG Fennelly in Case C-281/98 *Angonese* [2000] E.C.R. I-4139, para. 9).

372 Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 86. The Court did not touch upon its case law relating to receipt of services, but considered that the case had a sufficient link with Union law for different reasons (see the discussion under III.B.1.b., *supra*).

373 This is in particular the case if account is taken of the receipt of cross-border services, such as television broadcasts from another Member State. Lane and Nic Shuibhne cite the example of a Belgian national who watches TF1 from time to time on cable television, wondering whether this entitles him to rely on Union law vis-à-vis his own Member State (see Lane and Nic Shuibhne, "Case C-281/98 Roman Angonese v Cassa di Risparmio di Bolzano" (2000) *CML Rev.*, 1242).

374 Spaventa has noted, for instance, that it would be arbitrary to confine the protection of Union law to "those who are either sufficiently resourceful – or sufficiently well advised – so as to be able to establish a cross-border link" (Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 *CML Rev.*, 45).

375 See*, e.g.*, Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, para. 75 and Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, 746.

justify excluding those Union citizens who cannot demonstrate even a tenuous inter-State element.[376] That is the reason why, even though the wholly internal rule was not *directly* at stake in the *Metock and Others* case,[377] the doctrine surfaced nevertheless. Some of the intervening governments argued that the ECJ's interpretation of Directive 2004/38 would lead to unjustified reverse discrimination, in so far as nationals of the host Member State who have never exercised their free movement rights would be the only Union citizens who would not derive rights of entry and residence for their non-EU family members.[378] The ECJ, however, explicitly confirmed its traditional case law and held that the alleged discrimination fell outside the scope of Union law.[379]

Some authors have argued that the arbitrary consequences resulting from the Court's generous interpretation of the scope of Union law militate in favour of extending the scope of Union law rather than restricting it.[380] As explained higher, extending the scope of Union law to all Union citizens would indeed be apt to end the arbitrariness surrounding reverse discrimination, as made possible by the present case law, and thereby bolster the status of Union citizenship. However, as also explained higher, it would not be sensible nor be legally sound for this extension of the scope of Union law to be carried out by the Union courts alone. The said extension could arguably come about only by an amendment of the Union legislation on the free movement of persons.

In conclusion, it appears that the present case law on Article 21 TFEU, which revolves around the existence of an inter-State element, suffers from problems of legal uncertainty and perceived arbitrariness. Given that an extension of the benefits of Article 21 TFEU to all Union citizens seems possible only after intervention by the Union legislator, the Court should take up the responsibility to provide more certainty as to which categories of Union citizens fall under that article and should better articulate the reasons for this. If the underlying intention of Article 21 TFEU is to facilitate the movement of Union citizens in order to achieve aims related to the achievement of a Citizens' Europe, the Court should perhaps articulate this more systematically and apply Article 21 TFEU in accordance with these aims. Accordingly, only Union citizens having meaningfully contributed to these aims should be entitled to rely on Article 21 TFEU. Much will depend, of course, on the specific national measure a Union citizen is faced with and what right is claimed.

---

376 In the words of Nic Shuibne, "[i]t is precisely the ease with which [Union] law *can* be triggered which sours the logic of leaving the rest aside" (Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *CML Rev.*, at 738 (emphasis added)). See also Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15 *E.L.J.*, 648.

377 Given the fact that the EU-spouses were all Member State nationals who lived and worked in a Member State of which they were *not* a national, a cross-border element was clearly present.

378 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 76.

379 *Ibid*., paras 77-78. The Court referred to ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683.

380 Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 *CML Rev.*, 44-45.

Specifically with regard to rights relating to family reunification,[381] it can be argued that only lawful residence[382] in another Member State for a longer period of time should trigger the application of Union law and make it possible for a Union citizen to claim Union rights relating to family reunification against his own Member State.[383] Merely travelling to another Member State or receiving services in or from another Member State does not appear to be sufficient in this regard. Arguably, only Union citizens who have lawfully resided in another Member State for some time have sufficiently contributed to the aims of Article 21 TFEU in order to rely on that article against their home Member State and rely on the rights relating to family reunification there. As Dautricourt and Thomas have remarked: "It would appear somewhat unfair to open the unrestricted benefit of [Union] law for citizens having taken advantage of their free movement rights for a very short period of time while excluding the 'wholly sedentary' citizens".[384] At the same time, the purpose of the residence abroad should not matter. Students, for instance, who have pursued studies in another Member State for a longer period of time could certainly be considered to have contributed to the aims pursued by Article 21 TFEU and thus entitled to rely on that article.

Accepting this proposal would entail a certain restriction of the scope of the free movement provisions as currently interpreted in the case law, but it would, arguably, be beneficial. If the Court were to take this approach, it would much diminish the perceived arbitrariness surrounding its present case law, since the distinction between Union citizens falling within the scope of Article 21 TFEU and Union citizens falling outside that scope would depend on the logical and understandable criterion of having meaningfully contributed to the aims pursued by that article. This approach would also generate much more legal certainty for Union citizens and for national authorities called upon to apply and implement Union law.[385] Of course, it would be up to the Court to clarify what period of lawful residence in another Member State should be

---

381 As I have stated higher, this is the focus of my analysis. I do not seek to develop a comprehensive framework for determining the scope of Union law, although the approach developed can probably find application more broadly.

382 Of course, economic activity in another Member State for a certain period of time would trigger the application of the provisions on the free movement of economically active persons. Since I am principally concerned here with Article 21 TEU and the free movement rights of non-economically active persons here, I will not discuss that scenario.

383 An alternative, though in my view less preferable, approach would be to consider that every Union citizen who can demonstrate an even tenuous link with Union law falls within the scope of Union law, but that the home Member State may justifiably refuse the rights concerning family reunification to nationals who have not established a sufficient link with Union law for not having lived for a sufficiently long period in another Member State. As Lenaerts has remarked, the different steps in the reasoning of the Court, namely determination of the scope of Union law and justification of disadvantages incurred by certain categories of Union citizens, sometimes boil down to one test (see Lenaerts, "Union Citizenship and the Principle of Non-discrimination on Grounds of Nationality", in *Festskrift til Claus Gulmann - Liber Amicorum* (Copenhagen, Thomson, 2006), 290-309).

384 Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?" (2009) 34 *E.L. Rev.*, 445.

385 As some commentators have remarked, in the absence of clear criteria on this point it is very difficult for national authorities to ascertain whether a national falls within the scope of Union law. Moreover, if short visits to another Member States would be sufficient to trigger the application of Union law, such would expectedly give rise to problems of proof. See Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?" (2009) 34 *E.L. Rev.*, 46; Van Elsuwege and Adam, "Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance flamande" (2008) *C.D.E.*, 678.

considered sufficient, and possibly when it should have taken place.[386] Admittedly, the Court decides on case by case basis. This should not, however, prevent it from articulating the underlying reasons for allowing reliance on Article 21 TFEU and announcing more systematic criteria for such reliance.

The downside to the suggested approach is that it would require defining the scope of Union law in a more limited way than would theoretically be possible and that, consequently, less Union citizens would be able to rely on the rights relating to family reunification than under the widest possible interpretation of Union law.[387] This downside is, in fact, the direct consequence of the fact that the Court should respect the limited scope of Article 21 TFEU by interpreting it in accordance with the aims pursued by that Article. The Court should not, in my view, circumvent these limitations by giving an artificially broad interpretation to that Article.[388] Accordingly, the approach just set out would not only reduce the legal uncertainty and the arbitrariness associated with the current case law, but also be more legitimate in view of the division of competences between the Union and the Member States.

D. Conclusion

As was remarked in the introduction to this Title, the traditional case law on Union citizenship leads to a sharp distinction between Union citizens who can invoke the rights and privileges deriving from Union law, such as those relating to family reunification, and those who cannot. Only Union citizens who can demonstrate a link with two or more specific Member States qualify. This leads to instances of reverse discrimination. Recent case law goes a long way towards guaranteeing the benefit of Union law to broader categories of Union citizens by adopting a flexible interpretation of the inter-State element required. This liberal approach in the case law reduces the scope for reverse discrimination of Union citizens, but leads in turn to accusations of arbitrariness and legal uncertainty. The basic problem in this connection is that even an innovative interpretation of the provisions on Union citizenship cannot fully bridge the gap between those Union citizens covered by them and those Union citizens left out. Indeed, the Union Courts cannot, in my view, legitimately extend the protection of Union law to all Union citizens without ignoring the limitations inherent in the citizenship provisions.

The most sensible solution to the present problematic situation would be an amendment of Directive 2004/38 in the sense of enlarging its personal scope to cover static Union citizens. A more limited option would be to extend just the provisions

386 Martin wonders whether the exercise of the free movement rights should have taken place immediately before Union law is invoked (Martin, "Comments on Gouvernement de la Communauté française and Gouvernement wallon (Case C-212/06 of 1 April 2008) and Eind (Case C-291/05 of 11 December 2007)" (2008) 10 *Eur. J. Migration & L.*, 372). In my view, the timing of this exercise should not matter in order to determine the scope of Union law, except perhaps in cases of a very long interval between the movement and the moment the right is claimed (the Court's case law provides some indication in this regard: see ECJ, Case C-138/02 *Collins* [2004] E.C.R. I-2703, para. 28).

387 For instance, only Union citizens with sufficient resources to establish lawful residence in another Member State would be able to rely on the rights relating to family reunification.

388 See in this sense, for instance, Ritter, "Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234 " (2006) 31 *E.L. Rev.*, 690-710.

relating to family reunification to static Union citizens. These legislative amendments would extend the benefits of Union law to static Union citizens and would thereby make reverse discrimination of Union citizens impossible, at least as regards family reunification. At the same time it would take away the legal uncertainty and perceived arbitrariness currently surrounding the categories of Union citizens entitled to claim the rights regarding family reunification. Consequently it would put an end to the anomalous situation of Member States treating their (static) own nationals less beneficially than other Union citizens and even third country nationals[389] and do away with the need for Union citizens to create sometimes artificial links with Union law in order to be able to invoke the Union rights regarding family reunification.[390] It is unlikely however that legislative amendments on this point will take place any time in the near future.

In the absence of intervention by the Union legislator, the solution to the concerns set out above - namely reverse discrimination, legal uncertainty and arbitrariness - is that the Court articulates more clearly the reasons why a Union citizen can rely on Union law and brings a new consistency in its case law by applying the citizenship provisions in accordance therewith. Much will depend on the type of national measure a Union citizen is faced with. Where a Union citizen is faced with a national measure which legally or *de facto* annihilates his Union citizenship, he deserves the full protection of Union law. Accordingly, in such circumstances even Union citizens who cannot demonstrate an inter-State element should be entitled to rely on Union law, including the provisions relating to family reunification, where such is necessary in order to enable them to usefully exercise their citizenship rights. The required link with Union law in such circumstances is provided by Article 20 TFEU, possibly in combination with Article 21 TFEU. This reasoning seems to have been adopted by the Court in its judgment in *Ruiz Zambrano* and confirmed in its judgment in *McCarthy*. This case law can be applauded for strengthening the Union citizenship, while at the same time providing a persuasive justification for a limited extension of the scope of Union law to situations previously considered to be purely internal.

A similar approach can possibly be adopted where a Union citizen is faced with a national measure leading to reverse discrimination of static Union citizens in a way that violates fundamental rights, at least where national law does not provide adequate protection. If, in such instance, the right to respect for family life is violated, the Union citizen concerned should be entitled to rely on the Union provisions relating to family reunification. In such circumstances, Articles 18 and 21 TFEU could provide the required link with Union law. This approach was suggested by AG Sharpston in her Opinion in the *Ruiz Zambrano* case, but has to date never been followed by the ECJ. The possibility cannot be excluded that the Court will grab the opportunity to do so in future cases.

In other situations, the claim for Union law protection is less strong. Here, it seems that only Union citizens who make a contribution to the aims pursued by the

---

389 See on this subject, in some detail, Walter *Reverse Discrimination and Family Reunification* (Nijmegen, Wolf Legal Publishers, 2008), 78 pp.

390 A famous example is the phenomenon of Dutch nationals moving to Belgium in order to circumvent the stricter Dutch legislation regarding family reunification, also now as the "Belgian route". See, for instance, Vanvoorden, "Stelt het arrest Jia een einde aan de België-route?" (2007) *T.Vreemd*, 72-84.

provisions on Union citizenship should be entitled to rely on Union law and the provisions on family reunification in particular. The central provision in this context should be Article 21 TFEU. As I have argued higher, the aims currently[391] pursued by that Article are the free movement of Union citizens, which is apt to further the achievement of a Citizens' Europe with more social cohesion and political integration. Accordingly, only Union citizens who move and thereby meaningfully contribute to these aims should be entitled to rely on Article 21 TFEU in order to derive rights for themselves and their family members. In this connection, it is of utmost importance that the Court provides more guidance as to exactly what kind of movement is required. Specifically with regard to rights relating to family reunification, it may be argued that only lawful residence in another Member State for a longer period of time should trigger the application of Union law and make it possible for a Union citizen to claim rights relating to family reunification against his own Member State. If that is accepted, the Court should clarify what period of lawful residence in another Member State should be considered sufficient, and possibly when it should have taken place. This clarification and systematization of the Court's case law would entail more legal certainty and take away much of the arbitrariness associated with the present case law. As a consequence, it would provide a greater incentive for the exercise of Union citizenship rights and the "activation" of Union citizenship.

IV CONCLUSION

In this chapter I have examined what "triggers" the application of the provisions on the free movement of Union citizens and their family members. In this connection I have focused on the right to family reunification, which is traditionally considered to be a corollary of free movement. It is clear, first of all, that a Union citizen who moves to another Member State derives from Union law a right to be joined or accompanied by his close family members. In this connection it is not required that the latter have legally resided in another Member State before residing with him in the host Member State. Moreover, the exact moment on which the family relationship was created is irrelevant for the enjoyment of these rights. The Court's broad interpretation of the rights of entry and residence of family members of Union citizens and, hence, of the Union's competence regarding the free movement of Union citizens, is convincing. It is justified by a need to tackle obstacles to the effective enjoyment of the right to free movement and residence by Union citizens and, moreover, supported by strong fundamental rights considerations.

In the second place, it is less clear whether a Union citizen should move at all in order to claim the benefits of the free movement provisions, such as, in particular the right to be joined or accompanied by family members. Traditionally, this question was unambiguously answered in the negative. Recent case law, however, has gone some way towards recognising the enjoyment of these rights even by static Union citizens, who have never moved between Member States. I have argued that the reasoning followed in this case law, with *Ruiz Zambrano* and *McCarthy* as its current apotheosis, is convincing, but should probably be limited to cases where a Union

[391] As was pointed out already, the precise scope and meaning of Article 21 TFEU is determined by secondary Union law. Future secondary Union law could change or enlarge the aims pursued by the Article (see the discussion of possible amendments to Directive 2004/38 under III.B.5., *supra*).

citizen is confronted with national measures annihilating his Union citizenship. Besides, fundamental rights considerations could possibly also justify an extension of the free movement provisions to static Union citizens. In other cases, the enjoyment of the benefit of the free movement provisions and the provisions relating to family reunification in particular, probably still depends on movement between Member States. Accordingly, they apply only to Union citizens who have moved between Member States and have thereby contributed to the aims of a Citizens' Europe. In this connection, there is a real need for clarification of the required inter-State element. In my view, a rather demanding interpretation of that requirement is to be preferred, because it is apt to create more legal certainty and avoid arbitrary distinctions and because it is more in line with the division of competences between the Union and its Member States.

The broad answer given in recent case law to the questions discussed implies a broad construction of the scope of Union competence. This has a clear impact on the immigration policies of the Member States, because family members of Union citizens now derive a right of residence from Union law in situations that were previously considered to fall outside the scope of Union law. In these situations, the Member States can no longer apply their immigration laws in order to deny a right of residence to the individuals concerned. Nevertheless, it should be stressed that the broad interpretation far from extinguishes the possibility for the Member States to pursue an immigration policy. First of all, its consequences are limited *ratione personae* in that only certain categories of family members of Union citizens are affected, and only to the extent that the conditions of Directive 2004/38 are satisfied. Moreover, Member States are still allowed to restrict the free movement rights of family members of a Union citizen on grounds or public policy, public security or public health or in case of abuse or fraud.

There is a real concern, however, that Member States will not readily accept the full consequences of the free movement of Union citizens, in particular as they are construed in recent case law. As Currie points out, while judgments like *Metock and Others* are legally sound, they may be politically undesired.[392] The broad interpretation given to the free movement provisions may give rise to a concern on part of certain Member States to be losing the control of their borders. This effect is further reinforced by the Court's broad interpretation of the categories of family members entitled to free movement rights[393] and the current context of a financial crisis typified by pressure on national governments to reduce immigration. The said concern may lead to averse reactions by some Member States, such as the adoption of policies to restrict immigration of family members of Union citizens under the cover of an overly broad application of the permissible derogations discussed higher or the restriction of the possibilities to acquire their nationality.

At the end of the day, Member States should be willing to fully accept the consequences of the creation of Union citizenship and the rights bestowed on Union citizens, the important right of free movement in particular. Since the possibility for a Union citizen to be joined or accompanied by family members is essential for the effective exercise of their fundamental right to free movement and residence, Member

---

392 Currie, "Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock" (2009) 34 *E.L. Rev.*, 325.

393 See the discussion in Chapter 5, *infra*.

States should be allowed to restrict this possibility only where overarching fundamental interests are a stake. Resistance to this reality, fuelled by the claim for the need to have the power to pursue an effective immigration policy, may be misguided, since a broader construction of the Member States' powers in this connection would run directly counter to the aims of a Citizens' Europe.

Finally, it may be wondered whether the current Union legal framework surrounding Union citizenship is not excessively centred on free movement. The argument that the free movement rights should no longer play any role in triggering the applicability of the provisions on Union citizenship has become a familiar one. The continuing possibility of reverse discrimination of Union citizens as regards family reunification, for instance, does indeed appear to be somewhat of an anomaly in a Citizens' Europe. Still, as I have argued in this chapter, the exercise of free movement rights does add an intrinsic contribution to the achievement of the aims of a Citizens' Europe and could on that ground justify a difference in treatment. Of course, it might be argued that Union law should go beyond that and should prohibit any discrimination of Union citizens. That would contribute to the realisation of the full potential of Union citizenship and *ipso facto* take away a number of the problems surrounding the current distinction between those Union citizens entitled to claim the Union rights regarding family reunification and those who do not. Such a major overhaul in the Union legal framework should, however, come about only after intervention of the Union legislator and is, for that reason, less than plausible for the moment.

CHAPTER 5 RELATIVES IN THE ASCENDING LINE

I INTRODUCTION

A. Free movement for Union citizens and their family members

The right to move and reside freely within the territory of the Member States is perhaps the most important right associated with Union citizenship. Secondary Union legislation – at present Directive 2004/38 – confers this right not only on Union citizens themselves, but also on their close family members, who may "accompany or join" the Union citizen in the Member States. The reason for this extension is most commonly explained by the fact that a Union citizen could be deterred from exercising his or her right to free movement if he or she could not be accompanied by his or her close family members.[1] Such may, moreover, be required, by the right to respect for family life, which the Union is bound to respect. At the same time, it is clear that the conferral by the Union of derivative residence rights on family members, even those not possessing Union citizenship themselves, can have a great impact on the immigration policies of the Member States. The Member States will have to grant a right of residence to persons who would not independently qualify under their immigration rules. Perhaps for this reason in particular, the Union legislator has limited the residence rights of family members of a Union citizen by conferring these rights only on certain categories of family members and, moreover, surrounding them by restrictive conditions.

In this chapter I will examine whether the Union legislator strikes an appropriate balance between guaranteeing the effectiveness of the right to free movement for Union citizens, on the one hand and safeguarding sufficient scope for the Member States to pursue effective immigration policies, on the other hand. I will focus on the residence rights of ascendants of Union citizens, because a case study of this specific category of family members will allow a more in depth analysis of this issue. The ensuing conclusions can be expected to largely apply more broadly with regard to residence rights enjoyed by family members of Union citizens in general. Moreover, the study of the residence rights enjoyed by ascendants of Union citizens has a particular significance, since the restrictive conditions surrounding these rights have recently given rise to interesting controversies and have seemingly been partially discarded by the ECJ in recent case law. In the following, I will first present a general overview of the rights for family members of Union citizens laid down in Directive 2004/38 and next outline in more detail the questions tackled by this chapter.

B. Directive 2004/38

[1] See on this point also the detailed discussion in Chapter 4, *supra*.

1. Legislative history

Union law has a long tradition of conferring residence rights on family members of economically active persons. Accordingly, family members of workers,[2] self-employed persons and persons providing services[3] have since long enjoyed a right of residence in the host Member State. More recently, in 1990, residence rights were also conferred on family members of persons who were not yet economically active, namely students,[4] and persons who were no longer economically active.[5] Besides, in 1990, for the very first time, a general residence right was conferred on all Member State nationals who satisfied certain conditions, regardless of any economic activity, and their family members.[6]

These different instruments, and the rights laid down therein, were consolidated by the adoption of Directive 2004/38,[7] which henceforth regulates the rights of family members of Union citizens in a comprehensive way. The Commission had long

---

2 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] J.O. L257/2, Article 10. See also Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, [1968] O.J. Eng. Spec. Ed. I, 485 and Council Directive 72/194/EEC of 18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive of 25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, [1972] O.J. Eng. Spec. Ed. I, 474. The Commission has proposed to codify the provisions of Regulation 1612/68: see Commission Proposal for a Regulation of the European Parliament and of the Council on the freedom of movement for workers within the Union, COM(2010)204 final.

3 Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] O.J. L172/14, Article 1(1). See also Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, [1963-1964] O.J. Eng. Spec. Ed. I, 117, Article 2(1); Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, [1975] O.J. L14/10; Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive No 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, [1975] O.J. L14/14.

4 Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, [1990] O.J. L180/30, later replaced by Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, [1993] O.J. L317/59 after the ECJ had annulled the first directive on the ground that it was based on the wrong Treaty provision (ECJ, Case C-295/90 *European Parliament* v. *Council* [1992] E.C.R. I-4193).

5 Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, [1990] O.J. L180/28.

6 Council Directive 90/364/EEC of 28 June 1990 on the right of residence, [1990] O.J. L180/26.

7 For details on the legislative history of Directive 2004/38, see Carlier, "Le devenir de la libre circulation des personnes dans l'Union européenne: regard sur la directive 2004/38" (2006) *C.D.E.,* 13-34; Verschueren, "De nieuwe Europese verblijfsrichtlijn 2004/38 sinds 30 april van toepassing: het Europese burgerschap op kruissnelheid" (2006) 2 *T.Vreemd,* 97-127; Iliopoulou, "Le nouveau droit de séjour des citoyens de l'Union et des membres de leur famille: la directive 2004/38/CE" (2004) *R.D.U.E,* 523-557.

considered that there was a need to reform and codify the various existing legislative instruments on the free movement of persons. On 23 May 2003, the Commission presented a proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[8] According to the Commission, this ambitious proposal served four purposes[9]: 1) laying down the different rules on free movement in a single instrument, in the interests of reader-friendliness and clarity; 2) streamlining the arrangements for exercising freedom of movement; 3) tightening up the definitions of restrictions on the right of residence; 4) facilitating the right to free movement and residence of family members of a Union citizen, irrespective of nationality. The fourth one, in particular, is important for the purposes of my analysis in this chapter, as will become clear below.

The Commission's proposal was endorsed by the European Parliament on 11 February 2003, subject to a number of important amendments.[10] On the basis of those amendments, the Commission elaborated an amended proposal.[11] The amended proposal formed the basis for the discussions in the Council, which led to the adoption of a Common Position on 5 December 2003.[12] That Common Position was approved by the European Parliament on 10 March 2004.[13] The final Directive, Directive 2004/38 of the European Parliament and of the Council,[14] was adopted on 29 April 2004 and had to be implemented by 30 April 2006.[15]

2. Family members

a) Definition

---

8 Commission proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, [2001] O.J. C270E/150. The proposal was submitted to the European Parliament by the Commission by letter of 29 June 2001.

9 See the explanatory memorandum to the Commission's proposal, para. 1.4.

10 [2004] O.J. C43E/17. For the proposed amendments and their justification, see the Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2003) 199 final.

11 Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2003) 199 final.

12 Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. C54E/12.

13 [2004] O.J. C102E/518.

14 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. L158/77.

15 See Article 40 of the Directive.

Directive 2004/38 extends the right of free movement and residence to family members of Union citizens.[16] Article 2(2) of the directive states that "family member" means:

> "(a) the spouse;
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);"

Family members falling within one of these categories enjoy the right to free movement and residence, provided that they can demonstrate the appropriate "link" with the Union citizen concerned. This means essentially that they must "accompany or join" the Union citizen (see Article 3(1) of the Directive[17]).

It is not required that family members have the nationality of one of the Member States. Indeed, whereas Article 2(1), defining Union citizenship, explicitly refers to the condition of having the nationality of one of the Member States, Article 2(2), defining "family member", does not. Moreover, numerous articles of the Directive explicitly refer to "family members, irrespective of (their) nationality"[18] or "family members who are not nationals of a Member State".[19] This is further confirmed in the case law

---

16 For detailed discussions of the rights conferred by Directive 2004/38 on family members of Union citizens, see Urbano De Sousa, "Le droit des membres de la famille du citoyen de l'union européenne de circuler et de séjourner sur le territoire des états membres, dans la directive 2004/38/CE", in Carlier and Guild (eds.), *L'avenir de la libre-circulation des personnes dans l'U.E.* (Brussels, Bruylant, 2006), 103-126; Candela Soriano and Cheneviere, "Droit au regroupement familial et droit au mariage du citoyen de l'Union européenne et des membres de sa famille à la lumière de la directive 2004/38/CE" (2005) *Revue trimestrielle des droits de l'homme*, 923-953. For a detailed overview of the rights granted to third-country family members by the different Community Directives which were replaced by Directive 2004/38, see Barrett, "Family matters: European Community law and third-country family members" (2003) 40 *CML Rev.,* 369-421. For scholarly works taking a broader perspective on the position of family members in Union law, see Ní Shúilleabháin, "Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective" (2010) *Int'l & Comp. L.Q.*, 1021-1053; Meeusen, Pertegás, Straetmans and Swennen (eds.), *International Family Law for the European Union* (Antwerp-Oxford-Portland, Intersentia, 2007), 461 pp.; McGlynn *Families and the European Union: Law, Politics and Pluralism* (Cambridge, Cambridge University Press, 2006), 230 pp. For a very insightful analysis centred on the rights of partners under Union law, see Toner *Partnership Rights, Free Movement and EU Law* (Oxford and Portland, Hart Publishing, 2004), 286 pp. For an article that focuses on the rights of children, see Stalford, "EU Law and Children's Rights: A Case Study of EU Family Law" (2010) *Contemporary Issues in Law*, 1-24.

17 Article 3(1) is given a broad interpretation by the ECJ. For instance, in the case of a spouse of a Union citizen, it is not required that the marriage took place before the latter moved to the host Member State: see ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R., paras 85-93, with a case note by Cambien (2009) 15 *Colum. J. Eur. L.,* 321-341; ECJ (Order of 19 December 2008), Case C-551/07 *Sahin* [2008] E.C.R. I-10453, paras 24-33. See the detailed discussion in Chapter 4, *supra*.

18 See Articles 3(2)a, 17(3), 23, 27(1) and 28(2) of Directive 2004/38.

19 See Articles 4(1), 5(1)-(3), 6(2), 7(2), 9(1), 10(1), 12(2), 13(2), 16(2), 18, 20(1) and 24(1) of Directive 2004/38.

of the ECJ and in the preamble to the Directive.[20] From this it will be immediately clear that the rights granted to family members of Union citizens will be of importance first and foremost to family members not possessing the nationality of one of the Member States, *i.e.* 'third-country" or "non-EU" family members. Indeed, other family members are Union citizens themselves,[21] and thus derive free movement rights directly from this status rather than their status of a family member. However, it cannot be ruled out that the status of family member of a Union citizen creates additional rights for this latter category as well, since those rights are subject to different conditions.

In addition, the Directive also refers to two further categories of family members in Article 3(2), which states:

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) the partner with whom the Union citizen has a durable relationship, duly attested."

The Directive does not confer any firm rights on these two categories of family members, which I will label "other family members". It merely states in their regard that "the host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".[22] It must be immediately emphasised, however, that Article 3(2) explicitly states to be "without prejudice to any right to free movement and residence the persons concerned may have in their own right". This is important, as family members of the said categories may enjoy free movement rights under Union law which derive from their status of Union citizenship (if they have the nationality of a Member State) or third country national (if they do not have the nationality of a Member State).

b) Differentiated regime for ascendants and descendants

The Commission had proposed a definition of family members that would apply "across the band", *i.e.* to all categories of Union citizens benefiting from Directive

---

20 See, in particular, recital 5 in the preamble to the Directive, stating that "The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality".

21 This follows, of course, from Article 20(1) TFEU proclaiming, *inter alia*, that "Every person holding the nationality of a Member State shall be a citizen of the Union" (see also Article 9 TEU). See, in the same vein, Article 2(1) of Directive 2004/38, stating that "'Union citizen' means any person having the nationality of a Member State".

22 As such, Article 3(2) partly takes over the wording of Article 10(2) of Regulation 1612/68 and Article 1(2) of Directive 73/148/EEC, which called on Member States to facilitate the entry of any other family members of Union citizens or their spouses who are dependent on them or lived with them in the country from where they are arriving (see the Commission proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final).

2004/38.[23] The reason for this proposal was that, under the different sets of rules preceding Directive 2004/38, the ascendants of the different categories of persons were entitled to residence in the host Member State, except ascendants of students.[24] The Commission had proposed to do away with this differentiated regime for students. The Council, however, decided to reintroduce it. Article 7(4) of Directive 2004/38 states:

> "By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above."

Consequently, ascendants and descendants of students enjoy lesser rights than ascendants and descendants of other categories of Union citizens. This can probably be explained by the fact that students have to satisfy less stringent conditions regarding self-sufficiency than other Union citizens.[25] As far as ascendants of students are concerned, Article 7(4) explicitly provides that "Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner." Consequently, ascendants of students only enjoy the much less substantial residence rights of Article 3(2) of the Directive. Nevertheless, it should be remarked that the Court has recognised, in certain specific circumstances, important residence rights for the ascendants of an EU student who are the latter's primary carer.[26] As far as descendants of students are concerned, Article 7(4) grants residence rights only to their dependent children, which is narrower than the general category of "direct descendants who are under the age of 21 or are dependants" stated in Article 2(2)(c) of the Directive.[27] Although such is not explicitly stated, it can be assumed that other descendants of students, like non-dependent descendants or descendants in a further degree,[28] will be able to rely on the rights conferred by Article 3(2) of the Directive.

C. Problem statement

As was stated above, the basic reason for granting residence rights to the family members of economically active persons, and, more recently, of Union citizens regardless of economic activity, is that a genuine free movement of persons can only be achieved if "moving persons" have the right to be joined by their family members

---

23 The categories meant are those listed in Article 7(1)(a)-(c) of Directive 2004/38.

24 See Article 2 of Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, [1993] O.J. L317/59.

25 Students are not required to be economically active and need, besides being covered by a comprehensive sickness insurance, only "assure" the relevant national authority that they have sufficient resources for themselves and their family (see Article 7(1)(c) of the Directive).

26 See the discussion under IV., *infra*.

27 Strangely enough, the Commission, in a recent simplified guide for Union citizens entitled "Freedom to move and live in Europe. A guide to your rights as EU citizen" (available at http://ec.europa.eu/justice/policies/citizenship/docs/guide_free_movement.pdf) refers in this connection to the "dependent descendents" of students, rather than to their "children". This is probably an inaccuracy.

28 Given the average age of students, this possibility is of little relevance in practice.

in the host Member State.[29] The absence of such a right could deter a Union citizen from leaving his or her country and exercising his or her right to free movement, since he or she would thereby have to leave behind his close family members.[30] Consequently, it would work as an obstacle to the free movement of persons, which the Union free movement provisions seek to abolish. Below, I will refer to the justification just out as the "obstacles approach". A related justification sometimes invoked to extend a right of residence to family members of a Union citizen is that the free movement of citizens can only be achieved by guaranteeing the broadest possible integration of these family members in the host Member State.[31] This view takes the interests of the family members (namely enjoying a right to live in the host Member State, which allows them to "integrate") as a starting point rather than those of the Union citizen (namely the right to be joined by family members).[32] In my view, the need to make integration in the host Member State possible rather explains why the Union legislator extended certain rights of Union citizens, *other* than residence rights, to members of his family, such as the right for children of an Union citizen to enjoy access to education in the host Member State under the same conditions as nationals of that Member State.[33] The enjoyment of a right of residence, while not in itself aimed at integrating the family members in the host Member State, is of course a

---

29 This has been confirmed by the ECJ in numerous cases; see, *e.g.*, ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 52 and the case law referred to. On a more fundamental level, the justification for the extension of residence rights to family members is that Union citizenship can only reach its full potential if the movement of citizens is guaranteed against all restrictions (Snell, "And Then There Were Two: Products and Citizens in Community Law", in Tridimas and Nebbia (eds.), *European Union Law for the Twenty-First Century: Volume II* (Oxford and Portland, Hart Publishing, 2004), 62).

30 See the discussion in Cambien, "Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform" (2009) 15 *Colum. J. Eur. L.*, 333 *et seq.*

31 See, *e.g.*, ECJ, Case C-356/98 *Kaba* [2000] E.C.R. I-2623, paras 21-22, where the Court states: "The aim of Regulation No 1612/68, namely freedom of movement for workers, requires, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the [Union] worker's family in the society of the host country (Case C-308/89 *Di Leo* [1990] E.C.R. I-4185, paragraph 13). To that end, Article 10(1) of that regulation provides *inter alia* that a spouse, of whatever nationality, is entitled to install himself with a worker who is a national of one Member State and who is employed in the territory of another Member State". See further Sewandono *Werknemersverkeer en gezinsleven* (Deventer, Kluwer, 1998), 157; Strasser, Kraler, Bonjour and Bilger, "Doing Family. Responses to the Constructions of 'The Migrant Family' Across Europe" (2009) 14 *History of the Family*, 166.

32 Although one could argue that the absence of "integration rights" for the family members could work as an obstacle deterring a Union citizen from exercising his free movement rights. See the fifth indent of the preamble to Regulation 1612/68: "Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that […] obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family *and the conditions for the integration of that family into the host country*" (italics added). Still, in my view, it is important to conceptually distinguish the obstacles approach from the integration approach and accept that the former is the more important one. Confirmation of this can be seen in the fact that, under previous free movement legislation, the right of residence was enjoyed by a larger circle of family members than other "integration rights" such as access to the labour market of the host Member State (for an overview, see Sewandono *Werknemersverkeer en gezinsleven* (Deventer, Kluwer, 1998), Ch. 10).

33 See ECJ, Case C-308/89 *di Leo* [1990] E.C.R. I-4185, para. 13 and ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, paras 50-51. See further Martin and Guild *Free Movement of Persons in the European Union* (London, Edinburgh, Butterworths, 1996), 126.

prerequisite for exercising these other rights.[34] Accordingly, the extension of residence rights to family members of a Union citizen *indirectly* makes their integration possible in the society of the host Member State. A third justification sometimes invoked is the need for the Union to comply with fundamental rights, the right to respect for family life in particular.

The bottom-line is that the right of residence in the host Member State was extended to family members first and foremost in order not to deter Union citizens from exercising their free movement rights. Precisely for this reason, family members only have derivative residence rights,[35] namely the right to *accompany* or *join* a Union citizen in the host Member State.[36] However, if this is the underlying purpose, it must be wondered why these residence rights are restricted in scope. Even if we accept that the need to tackle obstacles to free movement only justifies extending residence rights to close family members and even if we accept for a moment that the circle of close family members[37] is adequately covered by the categories of privileged family members listed in Article 2 of Directive 2004/38, the question remains why the right of residence of persons belonging to one of these categories is made subject to restrictive conditions such as the condition of dependency with regard to ascendants or descendants older than 20.[38] It is not clear from the outset why Union citizens have the right to be joined only by dependent ascendants and descendants, but not by non-dependent ascendants and descendants. Put differently, it is not immediately clear why the absence of such a right is considered an obstacle that needs to be abolished by Union free movement rules in the former case, but not in the latter case.[39] As was already remarked, the reason must probably be sought in the desire of the Member States to limit the effect of the Union free movement provisions on their immigration policies and to limit the financial burden incurred by the immigration of family members of Union citizens.

In this chapter, I will focus on the residence rights enjoyed by ascendants of Union citizens and the restrictive conditions surrounding these rights, the condition of dependency in particular. I will try to ascertain whether Union law strikes a proper balance between the justifications just advanced for extending a right of residence to ascendants of a Union citizen, on the one hand, and the interests of the Member

---

34 See Greaves, "Who is a Dependent Member of a Worker's Family?" (1988) 13 *E.L. Rev.*, 275 (stating: "The rights granted to the families of the workers on the other hand, are more relevant to the process of integration of the migrant worker's family in the host Member State than to the exercise of the right of free movement itself").

35 Craig and De Búrca *EU law. Text, Cases, and Materials* (4th ed.) (Oxford, Oxford University Press, 2007), 773.

36 See, *e.g.*, Article 6 of Directive 2004/38.

37 In the sense that the absence of a right to be joined or accompanied by more distant family members would not have the same deterrent effect on the exercise of free movement right, and, therefore, not be an obstacle to free movement in the same way as would be the case for close family members.

38 The same question arises when the extension of residence rights to family members is looked at through the prism of the need to protect fundamental rights. It is not *prima facie* clear, for instance, why a stronger claim can be made under the right to respect for family life with regard to dependent family members than with regard to non-dependent family members. This will be considered in more detail below.

39 Tagaras, "Le champ d'application personnel du regroupement familial et de l'égalité de traitement des membres de la famille du travailleur dans le cadre du reglement 1612/68" (1988) *C.D.E.*, 341.

States, on the other hand. First, I will analyse the meaning of the terms "direct descendant" and "direct ascendant" (II). I analyse both descendants and ascendants, because such will allow me to draw a more well-founded conclusion as to the meaning of the term "direct" in this context. Next, I will inquire into the meaning of the condition of dependency, by examining how it is interpreted in the case law of the ECJ and how it is implemented by the Member States and come to a conclusion on whether this condition is justified (III). Lastly, I will focus on a recent development in the case law which recognises residence rights for the parent who is the "primary carer" of a Union citizen, despite the fact that the dependency condition is not satisfied (IV).

II DIRECT DESCENDANTS AND DIRECT ASCENDANTS

A. Notion direct descendants

The first issue is to determine what exactly is meant by the notion "direct descendants" in Article 2(2)(c) of Directive 2004/38. The term "descendant", in its essence, is rather unambiguous in meaning and refers to the children, grandchildren *etc.* of the Union citizen. It does not, on a natural meaning cover nieces, nephews *etc.* Black's Law Dictionary gives the following definition:

> **Descendant.** One who follows in lineage, in direct (not collateral) descent from a person. Examples are children and grandchildren.
> **descendant,** *adj.*
> ***collateral descendant.*** Loosely, a blood relative who is not strictly a descendant, like a niece or nephew.
> ***lineal descendant.*** A blood relative in the direct line of descent. Children, grandchildren, and great-grandchildren are lineal descendants.

However, this basic meaning can be given different interpretations, as it remains silent as to the link required between the Union citizen and his or her descendants, *i.e.* whether only blood relatives qualify or also adopted children, for instance. In addition, it must be asked how the term "direct" adds to this meaning. It must be noted that the term "direct" in combination with "descendants" was introduced by Directive 2004/38 and did not figure in earlier secondary legislation on the free movement of persons. *Prima facie* one can assume therefore that this term is not without meaning and probably qualifies or restricts the scope of the category of descendants in one way or another. However, an explicit explanation of the term figures nowhere in the text of Directive 2004/38 or in the proposals leading to the directive. Not surprisingly, it has given rise to diverging interpretations, as will become clear below. In the following I undertake to precisely determine the scope and meaning of the term "direct descendants".

On an abstract level, I can distinguish three different meanings, which will serve as the reference framework for my analysis.[40] First, it is possible that only descendants

[40] Admittedly, a combination of a number of these interpretations would be possible and further nuances within the different interpretations would also be possible.

with legal ties to the Union citizen and/or his spouse or partner qualify. In that case, the term "direct" excludes purely biological/genetic descendants. Second, it is possible that only biological/genetic descendants qualify. Consequently, the term "direct" excludes adopted children.[41] A third possibility is that only the children of a Union citizen and/or his spouse of partner are covered. Under that interpretation, the term "direct" excludes descendants in a further degree (grandchildren, great-grandchildren *etc*.).

The second interpretation must be rejected. As the Court has consistently held, the provisions on the free movement of persons must be interpreted broadly. A narrow interpretation, excluding adopted children from the category of descendants is not in line with the purpose of the Directive, namely to facilitate free movement by providing for the possibility for the family of the Union citizen to integrate in the host Member State. The Commission guidance for better transposition and application of Directive 2004/38[42] clearly states that the notion of descendants extends to adoptive relationships. As the guidance indicates, this is probably the only interpretation which is in accordance with Article 8 ECHR, which the Union is bound to respect. The third interpretation has been defended in legal literature.[43] It must be rejected however.[44] If the legislator had intended to restrict the notion of descendants in this way, it would probably have used the notion "children" rather than descendants[45] or stated its intention more clearly in another way. In this connection, it must be remarked that the Union legislator did refer to "children" rather than descendants when dealing with

---

41 *Black's Law Dictionary* (9th ed.), (St. Paul, Thomson West, 2009) gives the following definition of "adoption": "The creation of a parent-child relationship by judicial order between two parties who usu. are unrelated; the relation of parent and child created by law between persons who are not in fact parent and child. This relationship is brought about only after a determination that the child is an orphan or has been abandoned, or that the parents' parental rights have been terminated by court order. Adoption creates a parent-child relationship between the adopted child and the adoptive parents with all the rights, privileges, and responsibilities that attach to that relationship, though there may be agreed exceptions". The Oxford Dictionary of Law (Martin and Law (Eds.), *Oxford Dictionary of Law* (6 ed.), (Oxford, Oxford University Press, 2006), 590 p.) gives the following definition: "The process by which a parent's legal rights and duties in respect of an unmarried minor are transferred to another person or persons".

42 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 4.

43 Walleyn, "Gezinshereniging na de grote hervorming" (2008) *T.Vreemd*, 252; Verschueren, "*De nieuwe vreemdelingenwet: België in lijn met de Europese regelgeving*", in Foblets, Lust, Vanheule and De Bruycker (eds.), (Bruges, Die Keure, 2007), 194; Urbano De Sousa, "Le droit des membres de la famille du citoyen de l'union européenne de circuler et de séjourner sur le territoire des états membres, dans la directive 2004/38/CE", in J.-Y. Carlier and E. Guild (eds.), *L'avenir de la libre-circulation des personnes dans l'U.E.*, (Brussels, Bruylant, 2006), 108; Candela Soriano and Cheneviere, "Droit au regroupement familial et droit au mariage du citoyen de l'Union européenne et des membres de sa famille à la lumière de la directive 2004/38/CE" (2005) *Revue trimestrielle des droits de l'homme*, 949.

44 See McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge, Cambridge University Press, 2006), 47, who notes that "the intention of including the qualifying term 'direct' of descendant is not apparent. It may be that this is intended to exlude grandchildren, but doubtless they too are 'direct descendants'"; Oosterom-Staples, "Toelating en verblijf van EU-burgers en familieleden volgens de verblijfsrichtlijn (1)" (2007) *Migrantenrecht,* 92.

45 As it did in Directive 93/96, which refers in its Article 1 to "dependent children" rather than "dependent descendants".

the rights of family members of students (see Article 7(4) of Directive 2004/38 and the discussion under I.B.2., *supra*). This implies that the term descendants had a meaning different from "children" according to the Union legislator. The Commission guidance for better transposition and application of Directive 2004/38 also explicitly states with regard to the category of descendants that there is no restriction as to the degree of relatedness.[46]

In sum, it seems that the first interpretation must be embraced. Accordingly, only descendants with legal ties to a Union citizen and/or his spouse or partner are covered. This clearly covers stepchildren of a Union citizen.[47] The first interpretation gives the category of descendants a natural meaning and is, moreover, in line with the Court's case law holding that the provisions on the free movement of persons need to be interpreted broadly. The only hesitation that could exist is with regard to the term "direct", which seems to add little to this interpretation, despite the fact that it was explicitly added by the legislator. Admittedly, the first interpretation excludes purely biological or genetic descendants, but they would not be covered by a natural interpretation of "descendants" even in the absence of the qualification "direct". Still, this hesitation is not as such to call the said interpretation into question. Since Directive 2004/38 in many respects enlarges the scope of the free movement rights enjoyed by Union citizens and their family members,[48] it would be anomalous to interpret the term "direct" as restricting these rights. It is precisely the fact that the Directive aims *inter alia* to simplify and strengthen the right of free movement and residence of all Union citizens[49] on which the Court has relied to exclude an interpretation of the rights laid down in the Directive which is narrower in scope than the rights enjoyed under earlier legislative instruments on the free movement of persons.[50] The limited added meaning of the term "direct" is further confirmed by the fact that it was given no explicit consideration in the proposals and reports leading to the adoption of Directive 2004/38.

The addition of the term "direct" probably emphasizes that only descendants qualify, and not, by analogous interpretation, persons who are in a position that is in some respects similar to that of a descendant. This would exclude, for instance, collateral descendants such as nieces or nephews, but also the spouse or partner of a descendant. The same could be said of foster children, although this is more controversial. Some might argue that, on a broad instruction of the term descendant, foster children are also covered. Others may point out that foster children are not commonly considered to be someone's descendants given the absence of significant legal ties. The same remarks apply to children under guardianship. In my view, these categories are not covered by the notion "direct descendants". Still, Member States may extend the category of descendants under national law so as to include them. The Commission, arguably, is also of this view as far as foster children are concerned. The Commission

---

46 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 5.

47 Notably in this regard is that the ECJ in *Baumbast* accepted stepchildren as privileged family members (ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 17 in particular).

48 For example by including the descendants of the spouse or partner of the Union citizen.

49 See recital 3 in the preamble to the Directive.

50 ECJ, Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 49; ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, para. 60.

guidance[51] states that "foster children may have rights under the Directive, depending upon the strength of the ties in the particular case". This seems to indicate a certain degree of discretion on part of the Member States. By contrast, the Commission states in its guidance (at p.4) that the category of direct descendants extends to minors in custody of a permanent legal guardian. This broad interpretation is in line with the main purpose of the free movement provisions, namely to remove obstacles to free movement. On a broad construction of these provisions, a minor under legal guardianship of a Union citizen should be given the same treatment as the child of a parent – Union citizen. Nevertheless I do not agree with this broad construction as it stretches the notion of "descendant" beyond its natural meaning. If the legislator wanted to include it, it should have stated this more explicitly.

B. Notion direct ascendants

The Directive refers in its Article 2(2)(d) to "the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)". The inclusion of the ascendants of the partner of the Union citizen is a major improvement compared to earlier secondary free movement law because it contributes to the Directive's aim of giving marriages and registered partnerships an equivalent legal status under Union free movement law where the laws of a Member State treat them as equivalent. Directive 2004/38 introduced one other change to the category of ascendants, namely the addition of the term "direct", which did not figure in earlier secondary legislation.[52] The precise meaning of the insertion of this term is not immediately clear. Not surprisingly, the expression "direct relatives in the ascending line" has been given a number of different interpretations, as I will discuss in the following.

The meaning of the expression "ascendant/relative in the ascending line" in itself is fairly straightforward. It refers to parents, grandparents *etc.* By contrast, it does not normally include uncles, aunts *etc.* However, this basic meaning can be given different interpretations, as it remains silent as to the link required between the Union citizen and his ascendants, *i.e.* whether only blood relatives qualify or also adoptive parents, for instance. The same ambiguity surrounds the term in other languages like French ("ascendant") or Dutch ("ascendant").[53] Leading legal dictionaries for these three languages give the following definition (in English, French and Dutch, respectively):

---

51 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 5.

52 Article 10(b) of Regulation 1612/68, for instance, merely referred to "dependent relatives in the ascending line of the worker and his spouse".

53 Matters are further complicated by the fact that the English and Dutch versions of the directive do not use the term "ascendant/ascendant", but "relatives in the ascending line" and "bloedverwanten in opgaande lijn", respectively. In my view, however, this does not have any consequences for the meaning of these terms. I believe that the expressions used have exactly the same meaning as the term "ascendant/ascendant". On the relation between different language versions and the translation of ambiguous or vague terms, see Sewandono *Werknemersverkeer en gezinsleven* (Deventer, Kluwer, 1998), chapters 13 and 14.

> **Ascendant**. One who precedes in lineage, such as a parent or grandparent. Also termed *ancestor*.
> ***collateral ascendant.*** Loosely, an aunt, uncle, or other relative who is not strictly an ancestor. Also termed *collateral ancestor*.
> ***lineal ascendant.*** A blood relative in the direct line of ascent; ancestor. Parents, grandparents, and great-grandparents are lineal ascendants.[54]

> **Ascendant, ante**. Auteur direct d'une personne (appelée descendant), soit au premier degré (père, mère), soit à un degré plus éloigné dans la ligne paternelle (grands-parents paternels, etc.), ou maternelle (grands-parents maternels).[55]

> **Ascendent.** Bloedverwant die in opgaande rechte lijn in een *afstammingsrelatie* tot de *erflater* staat (ouders, grootouders enz.).[56]

The addition of the term "direct" further adds to the confusion. On an abstract level, three interpretations of the notion "direct ascendants/direct relatives in the ascending line" are possible. First, it is possible that only ascendants with legal ties to the Union citizen and/or his spouse or partner qualify. In that case, the term "direct" excludes stepparents[57] (in the absence of stepparent adoption[58]) and purely biological/genetic parents. Second, the notion can be held to cover only biological/genetic ascendants. Under that interpretation, the term "direct" excludes stepparents and adoptive parents.[59] Third, it is possible that only the parents of a Union citizen and of his spouse or partner are covered. In that case, the term "direct" excludes ascendants in a further degree (grandparents, great-grandparents *etc.*). Admittedly, a combination of a number of these interpretations would be possible[60] and further nuances within the different interpretations would be possible. Still, they provide a good reference framework for my discussion. As will be shown in the following, the different interpretations have all been supported by different authors or institutions.

---

54 *Black's Law Dictionary* (9th ed.), (St. Paul, Thomson West, 2009).

55 Cornu and Association Henri Capitant, *Vocabulaire juridique* (8 ed.), (Paris, PUF, 2007), 986 pp.

56 Nackom and Van Hoecke, *Juridisch zakwoordenboek* (2nd ed.), (Leuven, Acco, 2007), 167 pp. "Afstamming" is defined by this dictionnary as "bloedverwantschap in de dalende lijn; een afstammingsverband tussen een kind en zijn moeder/vader kan enerzijds gevestigd worden door biologische afstamming […], anderzijds door *adoptie"*.

57 *Black's Law Dictionary* (9th ed.), (St. Paul, Thomson West, 2009) gives the following definition of "stepparent": "The spouse of one's mother or father by a later marriage".

58 *Black's Law Dictionary* (9th ed.), (St. Paul, Thomson West, 2009) defines "stepparent adoption" as "the adoption of a child by a stepfather or stepmother".

59 See the definition of the terms "adoption" in n. 41, *supra*.

60 A combination of the first and third interpretation or of the second and third interpretation, for instance.

The second interpretation is problematic.[61] In my view it is highly unlikely that the Union legislator has intended to exclude adoptive parents from the free movement rights conferred on ascendants. Such would arguably be in violation of its fundamental rights obligations.[62] Furthermore, it would create an anomalous difference between the categories of ascendants and descendants. Indeed, higher I argued that the term "direct relatives in the descending line" should be understood as covering also adopted children. There seems to be no good reason not to give an analogous interpretation to the category of ascendants. I see further confirmation that this interpretation accords with the will of the legislator in the fact that not only ascendants of a Union citizen - the primary beneficiary of free movement rights - are included amongst the privileged family members, but also those of his or her spouse or partner. This at least demonstrates that the legislator was not only concerned with a biological or genetic link between ascendants and the primary beneficiary. Moreover, the Commission guidance for better application and application of Directive 2004/38 states explicitly that the notion of direct relatives in the ascending line extends to adoptive relationships.[63]

---

61 *Prima facie*, the third interpretation seems confirmed by the Dutch version of Directive 2004/38 which refers consistently to "bloedverwanten", *i.e.* (translated literally) "blood relatives". This term would seem to indicate a requirement of biological or genetic kinship. However, the term "bloedverwanten" no longer corresponds to that traditional interpretation, and is given a wider meaning by Belgian and Dutch lawyers, which includes for instance relationships based on adoption (see, on the evolved meaning of the term: Koens, Blankman and Driessen, *Het hedendaagse personen- en familierecht (behoudens het huwelijksvermogensrecht)* (Zwolle, Tjeenk Willink, 1998), 26 *et seq.*). For an actual definition of the term, see Dirix, Tilleman and Van Orshoven (eds.), *De Valks Juridisch woordenboek* (Antwerp, Intersentia, 2010), 621 pp. The definition given by that dictionary of "bloedverwant" is: "persoon die juridisch afstamt van een andere persoon, hetzij in opgaande of neerdalende rechte lijn, hetzij in de zijlijn". Moreover it must be noted that other language versions use a more neutral term, namely "relatives" rather than "blood relatives" in English and "Verwandten" rather than "Blutsverwandten" in German.

62 Because the interpretation gives adopted children lesser rights than natural children, as only the latter have the right to be joined by their parents in the host Member State. However, adopted children are equally protected by Article 8 ECHR (see ECtHR, Decision of 10 July 1975 in Case No. 6482/74 *X v. Belgium and Netherlands*; ECtHR, Decision of 5 October 1982 in Case No. 9993/82 *X v France* and ECtHR, Judgment of 22 April 1997 in Case No. 21830/93 *X, Y and Z v. UK*).

63 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 4.

The third interpretation has been defended by some authors,[64] but rejected by others.[65] In my view, it gives a natural and sensible meaning to the term "direct". Moreover, the interpretation is consistent with one of the purposes of the Directive, namely restricting the scope of beneficiaries of free movement rights in order not to confront the social assistance systems of the Member States with disproportionate burdens. Nevertheless it should be rejected, for a variety of reasons. First, it raises the problem, again, of asymmetry with the category of descendants. Second, it is at variance with the Commission guidance, which states that there is no restriction as to the degree of relatedness.[66] Lastly, it is not easily reconciled with the wording of Article 8(2)(a) of Directive 2003/86,[67] relating to the right of residence of "first degree relatives in the direct ascending line" of a third country national or his or her spouse. The explicit reference to "first degree relatives" in combination with "in the direct ascending line" implicates that the latter notion is not restricted to first degree relatives if it is not to be considered a pleonasm.

In my view, the first interpretation is the most natural one. The term "ascendants" is not commonly understood as covering stepparents.[68] One could object that this interpretation is not in line with the interpretation of descendants given above, since the latter did include "stepchildren". However, that objection is erroneous. The correct parallel to draw, when comparing the categories of descendants and ascendants, is that between stepchildren (*i.e.* the children of the spouse) and the parents of the spouse. The latter clearly do fall within my interpretation of ascendants. On the other hand, just like the spouse of a Union citizen's child does not fall within the category of descendants, it can be argued that the spouse of a Union citizen's father (*i.e.* his or her stepparent) does not fall within the category of

---

64 Urbano De Sousa, "Le droit des membres de la famille du citoyen de l'union européenne de circuler et de séjourner sur le territoire des états membres, dans la directive 2004/38/CE", in J.-Y. Carlier and E. Guild (eds.), *L'avenir de la libre-circulation des personnes dans l'U.E.*, (Brussels, Bruylant, 2006), 109. The author notes that the restriction to parents (and not grandparents *etc*.) did not exist in free movement law preceding Directive 2004/38 (*ibid.)*. See also Walleyn, "Gezinshereniging na de grote hervorming" (2008) *T.Vreemd*, 253; Verschueren, "*De nieuwe vreemdelingenwet: België in lijn met de Europese regelgeving*", in Foblets, Lust, Vanheule and De Bruycker (eds.), (Bruges, Die Keure, 2007), 106; Candela Soriano and Cheneviere, "Droit au regroupement familial et droit au mariage du citoyen de l'Union européenne et des membres de sa famille à la lumière de la directive 2004/38/CE" (2005) *Revue trimestrielle des droits de l'homme*, 949. See, in the same vein, the General Dental Council (GDC) guidance on European Parliament Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States, which states "Who is a direct relative in the ascending line? A person's parents are considered to be direct relatives in the ascending line." This is obviously not a document of high legal value, but it neatly illustrates how the term direct can be interpreted in accordance with the second interpretation set out above.

65 See, *e.g.*, McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge, Cambridge University Press, 2006), 47; Rogers and Scannell, *Free movement of persons in the enlarged European Union* (London, Sweet and Maxwell, 2005), 164.

66 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 5.

67 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12.

68 See, in this regard, the definition of "parent" by the Oxford Dictionary of Law: "The mother or father of a child. The term also includes adoptive parents, but does not usually include step-parents". See further Bainham, "Who or what is a parent?" (2007) 66 *C.L.J.*, 30-32.

ascendants. However, while this is correct, it should be noted that the term "direct" does not add much to this interpretation. Admittedly, purely genetic or biological ascendants are excluded by this interpretation. Presumably however, they would not be included either under a natural interpretation of the term ascendants without the qualification "direct".

Before I come to a final conclusion as to the preferred interpretation, I will look into the implementation of the Directive by a number of Member States, and verify how the category of ascendants was implemented. This may provide me with additional insight into the precise meaning and scope of this category. Directive 2004/38 was transposed in Belgium by a law [69] amending the provisions of the Law of 15 December 1980.[70] Article 2(2)(d) of Directive 2004/38 describing the category of ascendants is transposed by the Belgian legislator as follow (in Article 40bis §2 of the said law):

> "§ 2. Sont considérés comme membres de famille du citoyen de l'Union : […]
> 4° ses ascendants et les ascendants de son conjoint ou partenaire visé aux 1° ou 2°, qui sont à leur charge, qui les accompagnent ou les rejoignent." (French version)

The intention of the Belgian legislator becomes more clear when regard is had to the explanation given in the *projet de loi* that preceded the adoption of the said amending law.[71] The *projet de loi* describes the category of ascendants as follows (at p. 42):

> 4° Les ascendants (parents, grands-parents, etc.) ou ceux du conjoint ou du partenaire tel que visé au 1° ou 2°, qui sont à leur charge (article 2, § 2, point d, de la directive).

It further explains that the spouse of ascendants mentioned under 4° is not considered a family member, and enjoys only the rights mentioned in Article 3(2) a) of Directive 2004/38.[72] It is crystal-clear from this that the Belgian legislator rejects the third interpretation set above (the *projet de loi* explicitly refers to grandparents *etc*.) and apparently embraces the first interpretation (by excluding stepparents). However, it must immediately be remarked that the Belgian legislator reached this interpretation seemingly without taking the term "direct" into account since, first, the term "direct"

---

69 Loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l' accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 25 april 2007 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, (2007) *B.S.* 25752, *available at* http://www.ejustice.just.fgov.be/cgi_wet/wetgeving.pl. For a discussion, see Walleyn, "Gezinshereniging na de grote hervorming" (2008) *T.Vreemd*, 247-265.

70 Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, (1980) *B.S.* 14584, *available at* http://www.ejustice.just.fgov.be/cgi_wet/wetgeving.pl.

71 Projet de loi de 11 Janvier 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, [2006-2007] Doc. Parl., Chambre, 51-2845/001 ; *available at* http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=51&dossierID=2845.

72 The projet de loi refers in this regard to "le conjoint des parents visé dans le nouvel article 40bis, § 2, 2° et 3°". This is probably a mistake, and the reference should be understood as to Article 40bis, § 2, 3° and 4° (see Sarolea, "Le nouveau visage du droit au regroupement familial après deux années de réforme" (2008) *Revue trimestrielle de droit familial,* 366).

does not figure in the text of the Belgian law, and, second, the description of the category of ascendants was not changed as a consequence of Directive 2004/38.[73]

By contrast, the word "direct" ("rechtstreeks") was explicitly inscribed in the Dutch legislation. In the Netherlands, the category of ascendants is transposed as follows:

> "de rechtstreekse bloedverwant in opgaande lijn die ten laste is van de vreemdeling of van het gezinslid, bedoeld onder a of b".[74]

However, neither the *Vreemdelingenbesluit* itself, nor its explanatory memorandum (*toelichting*) explain how the term "rechtstreekse bloedverwant" needs to be understood.

In the UK, the category of ascendants is transposed by Regulation 7 of the *Immigration (European Economic Area) Regulations 2006*, which states:

> **"7.**—(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person— […] (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner"

The European Casework Instructions of the UK Border Agency[75] describe this category as "Dependants in the ascending line (*i.e.* parents, grandparents) of the EEA national or of his/her spouse/civil partner." This statement clearly rejects the third interpretation stated above. Curiously, however, the same instructions equate the notion "direct relatives in the descending line" with "children". The instructions do not give further guidelines that clarify whether the definition includes adoptive parents or stepparents.

These national provisions lend further support to the conclusion that the notion "direct relatives in the ascending line" must be interpreted in accordance with the first interpretation set out above. Accordingly, adoptive parents are included, but probably stepparents are not. This interpretation is, as was pointed out above, parallel to my interpretation of "direct descendants". Again, it must be observed that the term "direct" hardly adds anything in this interpretation. This probably explains why the term was given no explicit consideration in the legislative procedure leading to the adoption of the Directive. Still, it remains to be wondered why the legislator has considered it necessary to add the term.

Possibly, the term "direct" was inserted mainly to emphasise that only ascendants are covered, and not, by analogous interpretation, persons who are in a position that is in some respects similar to that of an ascendant, like foster parents or a legal guardian. In my view, they are not, strictly speaking, included in the category of privileged ascendants. Obviously, Member States are competent to extend the notion of ascendants under national law to foster parents or the legal guardian of a minor. This discretionary competence is, in my view, partially confirmed by the Commission guidance, which states: "foster parents who have temporary custody may have rights

---

73 See old Article 40 of the Law of 15 December 1980.

74 Besluit van 23 november 2000 tot uitvoering van de Vreemdelingenwet 2000 (*Vreemdelingenbesluit 2000*), Article 8.72)d).

75 *Available at* http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/ .

under the Directive, depending upon the strength of the ties in the particular case". With regard to legal guardians however, the Commission states in its guidance that the notion of direct relatives in the ascending line extends to minors in custody of a permanent legal guardian. This broad interpretation cannot, in my view be defended on account of the need to construe the provisions on the free movement of person broadly, as it is not a natural interpretation of the term descendants (see also the discussion above). Accordingly, if the Union legislator wanted to include it, it should have stated this more explicitly.[76]

Some additional support for that view can be found in a provision in the family reunification Directive.[77] Admittedly, that Directive deals with the right to family reunification by third country nationals residing lawfully in the territory of the Member States,[78] whilst I am concerned here with the rights of family members of Union citizens. All the same, the provisions of Directive 2003/86 are in certain regards very similar to those of Directive 2004/38 and not without relevance to the interpretation of the latter. This was explicitly acknowledged by the ECJ in *Metock and Others*.[79] Article 10(3) of the Directive provides with regard to family members joining a refugee[80]:

> "If the refugee is an unaccompanied minor, the Member States:
> (a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);
> (b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced."

Obviously this article applies to third country nationals, but in my view it also reflects to some extent the view of the Union legislator on the scope of the rights relating to family reunification of Union citizens: Member States are obliged to authorise the residence of relatives in the ascending line of a child, but not of his or her guardian. The only relevant difference with regard to Union citizens is perhaps that the category of privileged ascendants is not limited to the first degree ascendants. At the same time, I note that this discussion is largely theoretical as a guardian will not normally be dependent on the minor in guardianship.

---

76 This would possibly be different only in exceptional circumstances where the legal guardian was the primary carer of a child and which involved a possible violation of Article 8 ECHR (see under IV.B.2.b., *infra*).

77 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12.

78 See Article 1 of the Directive.

79 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241. The ECJ rejected an interpretation of Directive 2004/38 which would have the "paradoxical outcome" that Member States with have more far-reaching obligations with regard to admitting non-EU nationals for the purposes of family reunification under Directive 2003/86 than under Directive 2004/38 (see para. 69).

80 According to Article 2(b) of the Directive, "refugee" means any third country national or stateless person enjoying refugee status within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967.

C. Conclusion

The meaning of the terms ascendants and descendants in themselves is rather straightforward. More difficult to determine is the precise relationship required between a Union citizen and his ascendants or descendants. This ambiguity is reinforced by the qualification "direct", which is explicitly used by the Union legislator for the first time in this connection in Directive 2004/38. Consequently, the expressions "direct ascendants" and "direct descendants" have been interpreted differently by different authors and institutions and different views have been defended in legal literature. On closer examination, however, most of these views should be rejected. The correct interpretation in my view is that only ascendants and descendants with legal ties to the Union citizen and/or his spouse or partner qualify. Admittedly, the term "direct" admittedly does not add much to this interpretation. Presumably it was added mainly to make to emphasise that only ascendants and descendants are covered, and not, by analogous interpretation, persons who are in a position that is in some respects similar. Still, the foregoing discussion of the existing ambiguities and possible diverging interpretations shows that there is a real need for clarification in the case law of the Court of the precise meaning of the terms "direct ascendants" and "direct descendants".

III DEPENDENCY

The next issue to determine is the exact meaning of the notion dependency, since ascendants of a Union citizen will only enjoy residence rights as his or her family member if they are dependent on him or her. The condition of dependency has given rise to discussions in legal literature and is still surrounded by important question marks, although some of these have disappeared after clarifications brought by recent case law from the ECJ. In the following, I will try to determine more precisely the justification and meaning of this condition, looking at Union legislation and ECJ case law, but also at the implementation of this condition by a number of Member States. Given that the condition of dependency is interpreted by the ECJ identically with regard to both ascendants en descendants, I will discuss cases which concern either of those categories of privileged family members.[81]

A. Meaning

1. Possible justifications

The dependency condition effectively limits the scope of the ascendants of Union citizens whose residence rights are guaranteed under Union law. The reason for this

[81] It must be noted that the English language version of Directive 2004/38 does not state the condition of dependency in identical terms for both categories: it requires relatives in the descending line to be "dependants" and relatives in the ascending line to be "dependent'. Both expressions should probably be understood to mean exactly the same. This is confirmed by other language versions of the directive which use the same expressions in both cases: see, for instance, the French version (which uses the term 'à charge' in both cases) and the Dutch version (which uses the expression 'die te hunnen laste zijn' in both cases).

limitation should probably be sought in the desire on part of the Member States to limit the scope of the privileged family members in order to minimize the number of migrants they are obliged to accept on their territory as a consequence of family reunification. This can be further explained by the concern that migrants will potentially constitute a burden on the State finances.

With some imagination, this limitation could be said to be in line with the "obstacles approach" set out above: it is probably more of an obstacle to leave behind family members dependent on you than family members who can live independently. Non-dependent family members can be thought, moreover, to be more likely to have an independent right of residence especially where it concerns Union citizens.[82]

An additional consideration may be Article 8 ECHR, which contains the right to respect for family life[83] and which is enforced by Union law.[84] The obligations flowing from Article 8 ECHR will be discussed in more detail below. Simply put, that article precludes States, under certain circumstances from refusing family members to live together in the host Member State.[85] Admittedly, States have a margin of appreciation in this regard, and interferences can be justified under Article 8(2) ECHR. Nevertheless, it may be thought that refusing dependent family members a right to live with the person they are dependent on will be harder to justify under Article 8(2) ECHR, since they can presumably not live alone – in the absence of their family members.[86] This could also explain why dependent family members are considered more worthy of residence in the host Member State by the Union legislator.

The foregoing arguments are merely possible justifications for imposing the condition of dependency. Before subjecting them to a more critical analysis, I will consider how the ECJ interprets the condition of dependency and determine whether its interpretations are in line with the justifications just given or with other justifications invoked by the ECJ. This analysis will allow me, on a more fundamental level, to come to a conclusion as to whether the dependency limitation strikes an appropriate balance between the interests of the Member States and the principles underlying the free movement of persons.

2. Case law

---

82 Union citizens have an independent right of residence if they fulfil the conditions of *inter alia* having sufficient resources and comprehensive sickness insurance cover (see Article 7(1) of Directive 2004/38). Without wanting to pre-empt the discussion below on the exact meaning of the dependency condition, it can be pointed out already that it seems plausible that non-dependent family members are more likely to fulfil these conditions than dependent family members.

83 See also Article 7 of the Charter of Fundamental Rights.

84 The Union is bound by international human rights obligations. Hence, Union legislation, including Directive 2004/38, has to be in line with Article 8 ECHR.

85 See also the detailed discussion under IV.A.2., *infra*.

86 See the discussion below on the "primary carer" (*infra*, under IV). See also, Strasser, Kraler, Bonjour and Bilger, "Doing Family. Responses to the Constructions of 'The Migrant Family' Across Europe" (2009) 14 *History of the Family*, 170.

According to the ECJ, the status of "dependent" family member is the result of a factual situation characterized by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse.[87] Two points clearly ensue from this. The first point is that dependency in this context relates to a factual situation. The legal status of the family member or the legal consequences ensuing from his relationship with the Union citizen in question are not immediately relevant. Accordingly, the ECJ held that the status of dependent family member does not suppose the existence of a right to maintenance.[88] The ECJ justifies this position by pointing out that otherwise the status of dependent family member would depend on national legislation, which varies from one Member State to another, and this would jeopardise the uniform application of Union law.[89]

That reasoning is convincing.[90] It has been argued, however, that by not taking into account legal obligations to maintenance, the ECJ is interpreting the dependency condition too narrowly because it excludes descendants or ascendants who have a *right* to be supported by their Union family member but are not *de facto* supported by him or her.[91] This results in a situation which is harsh on the family members concerned: they can be denied a right to live in the host Member State if the Union citizen concerned is not actually supporting them - since they are not then considered "dependent" family members - despite the fact that they are legally so entitled. In my view, the ECJ is right in not taking legal obligations into account in assessing dependency, for the reasons just explained. The non-performance of maintenance obligations is a matter which should be remedied under national law. Moreover, this interpretation is in line with the desire of the Member States to limit the number of migrant family members.

The second point is that dependency relates to material support, *i.e.* financial dependency[92] is required and not emotional or affective dependency. AG Tizzano in *Zhu and Chen* noted in this regard[93]:

> "84. Nor can it be concluded, contrary to what may be inferred from the order for reference, that the concept of a dependent family member includes people who are 'emotionally dependent' on the [Union] national who has a right of residence or those

87 ECJ, Case 316/85 *Lebon* [1987] E.C.R. 2811, para. 22; ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 43.

88 ECJ, Case 316/85 *Lebon* [1987] E.C.R. 2811, para. 21.

89 ECJ, Case 316/85 *Lebon* [1987] E.C.R. 2811, para. 21; ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 36. See also Opinion of AG Lenz in Case 316/85 *Lebon* [1987] E.C.R. 2811, para. 31.

90 Although, it should not go unnoticed that the Court does in fact refer to the national legislation of the Member States for the definition of other terms central to the free movement rules, such as "nationality". See Chapter 2, *supra*.

91 Tagaras, "Le champ d'application personnel du regroupement familial et de l'égalité de traitement des membres de la famille du travailleur dans le cadre du reglement 1612/68" (1988) *C.D.E.*, 334-335.

92 I use the terms material and financial dependency here as synonyms. Accordingly, financial dependency refers to dependency on all types of material support, not just the provision of money. Financial dependency is sometimes interpreted more narrowly as covering only the latter kind of support. See, *e.g.*, Decision of the Social Security Commissioner (Edward Jacobs) in case CIS/2100/2007 [2008], para. 29: "Although support must be 'material' it need not necessarily be financial. It could, for example, take the form of the provision of housing, clothing and food."

93 Opinion of AG Tizzano in Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 84-86.

> persons whose right to remain in a Member State 'depends' on the right of the [Union] national.
> 85. Even if we were to ignore the case-law of the Court of Justice just referred to, I would observe that only the English language version uses a neutral term like 'dependent' whereas, as the Commission correctly points out, in all the other language versions the term used relates unambiguously to *material dependency*."

This is a fair point. The above cited case law clearly requires *material* support, which excludes emotional dependency. Moreover, a number of language versions of Directive 2004/38 indeed refer, in less ambiguous terms, to a condition of financial dependency. The Dutch version of the directive for instance refers to "ten laste zijn" rather than the more neutral "afhankelijk zijn", the French version to "être à charge" rather than "être dépendant" and the German version refers to "Unterhalt gewährt wirden" rather than to "abhängig sein". The first of these terms each time clearly refer to material dependency and are not normally understood to cover emotional dependency.[94] This interpretation has also been confirmed by the Commission in its guidance on the application of Directive 2004/38.[95] Moreover, emotional dependency would seem to be more difficult to asses, and accepting it would therefore create more uncertainty in the application of Directive 2004/38.

Yet, interpreting dependency as relating to financial dependency only is hard to reconcile with the "obstacles-approach". It is hard to see why a Union citizen would be deterred more from exercising his free movement rights if he could not be joined by family members which are financially dependent on him than if he could not be joined by family members which are emotionally dependent on him. Some would even argue that the absence of the latter right would have a greater deterrent effect on Union citizens intending to move to another Member State, since financial support is arguably easier to maintain from a distance[96] than emotional support. More importantly, it would seem that this interpretation is difficult to justify under Article 8 ECHR as it would seem to be the case that the case for emotionally dependent family members under Article 8 ECHR is at least as strong as for financially dependent family members.[97]

---

94 The same observation applies with regard to the (nearly identical) terms used in the legislation which preceded Directive 2004/38; see *inter alia* Article 1(1) of Directive 73/148.

95 See also the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 5.

96 Union citizens moving to the host Member State and leaving behind financially dependent family members in the home Member State could continue their financial support, for example by sending money.

97 The ECtHR has in the past allowed "family life" to be established on the basis of existing emotional ties (see, *e.g.*, ECtHR, Judgment of 23 September 1994 in Case No. 19823/92, *Hokkanen v. Finland*, para. 55; ECtHR, Judgment of 22 June 2004 in Cases Nos. 78028/01 and 78030/01, *Pini and Others v Romania,* para. 150), but not on the basis of purely financial ties. See also the partly dissenting opinion of Judge Rozakis, joined by Judge Tulkens, in Judgment of 13 December 2007 in Case No. 30943/96, *Sahin v Germany*: "In conclusion, in the balancing of the various factors to be taken into account in determining the necessity of the interference in a democratic society, weight must be given to the radical nature of the measure of prohibition applying in a situation where the parent enjoys a *minimum* of family life, the aim being in most cases simply to safeguard the continuation of emotional ties between the parent and the child".

In *Jia*[98] the ECJ clarified that

> "'dependent on them' means that members of the family of a [Union] national established in another Member State […] need the material support of that [Union] national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the [Union] national"[99]

and that:

> "in order to determine whether the relatives in the ascending line of the spouse of a [Union] national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves"[100]

Prima facie this seems to be in line with the aforementioned desire of the Member States to restrict the circle of privileged family members to those who actually need the support of a Union citizen. However, the Court also, rather curiously, consistently held that there is no need to determine the reasons for recourse to material support or to raise the question whether the family member concerned would be able to support himself by taking up paid employment.[101] This interpretation effectively means that the Union is indifferent to the reasons why a family member of a Union citizen is receiving material support from the latter. Whether this is because he can genuinely not find a job that allows him to support himself or whether he just prefers to be indulgent does not seem to matter for his entitlement to residence as a dependent family member. As one author has put it: "[e]ven idleness will not prevent the exercise of the right [to residence as a dependent family member]".[102]

That is hard to square with the concern on part of the Member States to limit the circle of privileged family members in order to reduce the burden on State finances. Through its interpretation, the ECJ opens up residence to precisely those family

---

98 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, with case notes by Elsmore and Starup in (2007) *CML Rev.,* 787-801; Martin in (2007) *Eur. J. Migration & L.*, 457-471; Oosterom-Staples in (2007) *N.T.E.R.,* 191-200; Tryfonidou in (2007) *E.L.Rev.*, 908-918; Woltjer in (2007) *SEW,* 303-306. Mrs. Jia, a retired Chinese citizen went to visit her son who was living in Sweden with his German spouse. For this purpose, she obtained a visitor's visa valid for a maximum of 90 days. Shortly before the expiry of her visa, she applied to the Swedish authorities for a residence permit in her capacity as a dependent family member of a Union citizen, namely the mother of the spouse of a Union citizen. She argued that the pensions she and her husband received in China were not sufficient to live on and that no additional financial help was available from the Chinese authorities. This, she argued, proved her status of "dependent" family member. The Swedish authorities rejected Mrs. Jia's application for a residence permit because they were not satisfied that she was a financially dependent family member in the sense of Union free movement law.

99 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 43.

100 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 37.

101 ECJ, Case 316/85 *Lebon* [1987] E.C.R. 2811, paras 22-23; ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 36. The Commission has even stated this in broader terms: "There is no need to examine whether the family members concerned would in theory be able to support themselves, *for example* by taking up paid employment (italics added)." (see Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 5).

102 Greaves, "Who is a Dependent Member of a Worker's Family?" (1988) 13 *E.L. Rev.*275.

members which are likely to constitute a burden on the social assistance system of the host Member State: jobless people who are in need of support but do not make efforts to support themselves. Persons fitting this profile are likely to apply for welfare benefits and, as the Court held in *Lebon*, the fact that a family member applies for such benefits (*in casu* the Belgian *minimex*) does not imply that he or she is no longer to be considered dependent.[103] The Court considers that interpretation to be dictated in particular by the principle according to which the provisions on the free movement of persons must be construed broadly.[104] However, that principle serves to preserve the *effet utile*, whereas the Court's interpretation is not giving the dependency condition any useful effect if regard is had to the purpose it is intended to serve.

In my view, there is more to be said for the interpretation advocated by AG Lenz in *Lebon*.[105] The AG agreed that "dependent on" referred to *de facto* material support, but he added that it was necessary to examine the reasons for recourse to this support. In his opinion dependency requires that there are objective circumstances independent of the will of the person concerned which make it necessary to have recourse to support and that the person concerned is not able to meet his own needs by taking up suitable employment in spite of serious efforts to find it.[106] This interpretation, in my view, gives more useful effect to the dependency condition in that it actually limits the scope of dependent family members to those persons who are genuinely in need of support. Moreover, it could be argued that it is in line with the obstacles approach: it is arguably less of an obstacle to free movement if a person cannot be joined by a family member who is able to support himself than by a family member who is not so able. Similarly the latter may have a stronger case under Article 8 ECHR.[107] At the same time, I point out that any recourse to welfare benefits should not in itself be sufficient to qualify the family member concerned as non-dependent.[108] However, a structural recourse[109] to income-replacing welfare benefits may, under certain circumstances, imply that another condition of the residence right for family members of a Union citizen is not fulfilled, namely that the latter has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State.[110] Accordingly, in such a situation the family member may no longer enjoy a right of residence in the host Member State, not because he can no longer be considered dependent, but because of his or her EU relative's insufficient financial resources.

---

103 ECJ, Case 316/85 *Lebon* [1987] E.C.R. 2811, para. 20.

104 ECJ, Case 316/85 *Lebon* [1987] E.C.R. 2811, paras 22-23; ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 36.

105 Opinion of AG Lenz in Case 316/85 *Lebon* [1987] E.C.R. 2811.

106 Opinion of AG Lenz in Case 316/85 *Lebon* [1987] E.C.R. 2811, paras 39-42.

107 In that a forced separation of a person from his family members will likely be more difficult to justify under Article 8(2) ECHR if this person could not do without the support of his family members.

108 As AG Lenz points out, some benefits consist only of small sums of money, which do not remove the necessity for substantial contributions from relatives who provide support (Opinion of AG Lenz in Case 316/85 *Lebon* [1987] E.C.R. 2811, para. 33).

109 I mean that recourse caused by temporary financial difficulties should not lead to the loss of the right of residence, as the Court clearly stated in ECJ, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, paras 40-45.

110 See Article 7(1)b) of Directive 2004/38 on the "Right of residence for more than three months".

3. Evaluation

It seems to me that the ECJ's interpretation of the dependency condition is not consistent with what I have identified as the reasons that could justify granting a residence right to dependent descendants and ascendants only. On the one hand, if the Member States' desire to limit immigration based on family reunification out of a concern to reduce the burden on State finances is taken seriously, the dependency condition has to be interpreted more meaningfully as a real limitation. One of the factors to be taken into account when assessing dependency should be the reasons for having recourse to material support. Only necessity based on objective circumstances independent of the will of the family member concerned should qualify for dependency. On the other hand, if the reason for granting a right of residence to dependent family members is motivated by fundamental rights concerns and the consideration that the absence of such a right would create an obstacle to free movement, dependency should also encompass emotional dependency. However, such an interpretation is difficult to reconcile with the current wording of the Directive in other language versions.

On a more fundamental level, I am of the opinion, however, that the condition of dependency should be removed altogether since the justifications for maintaining it are not convincing. It seems to me that the dependency limitation is implicitly based on the mistaken view that dependent ascendants and dependent descendants have a stronger case for residence in the Member States than non-dependent ones. However, if dependency is interpreted purely as financial dependency, it must be wondered why this makes a strong case for a right of residence. Financial support can often be granted from a distance and does not require the Union citizens to be joined by their dependants in the host Member State. This is especially true if dependency refers to needs in the country of origin, since it will often be cheaper to fulfil those needs in that country, and hence easier to support the fulfilment of those needs by EU family members from a distance, than in the host Member State.[111] The case would be different for emotional dependency, but it is clear from other language versions that this is not a concept the Member States had in mind when insisting on maintaining the dependency condition in Directive 2004/38.

I do not consider either that the dependency condition is a limitation which can be justified by financial concerns. It should not be forgotten that the derivative right of family members is subject to a number of conditions which are inserted precisely to avoid them becoming a financial burden for the host Member State. Most importantly, they are in principle only entitled to residence as long as they do not become a burden to the social assistance system and are covered by sickness insurance.[112] Besides, family members of non-economically active Union citizens

---

111 On the facts of the *Jia* case, for instance, it seems plausible that Mr. and Mrs. Jia could have been financially supported by their son and his German spouse, living in Sweden, by money transfers to China to complement their meagre pensions. Their financial dependency did not necessarily warrant a right of residence for them in Sweden.

112 See, notably, Article 7(1)b) of Directive 2004/38, which makes the right of residence for longer than three moments for Union citizens and their family members subject to the condition of "having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and having comprehensive sickness insurance cover in the host Member State" and Article 14 of the Directive, which states: "Union citizens and their family members shall have the right of

have no claim to social assistance during the first three months of residence and no claim to financial support for students before they have obtained a right to permanent residence.[113] Financial concerns on part of the Member States can sufficiently be addressed by consistently applying these provisions. Moreover, by excluding non-dependent descendants and ascendants from the right to residence in the host Member State, the Member States excluded precisely those categories who are least likely to present a burden for the host Member State. As the Commission explained in a proposal discussed below:

> "The present scheme contains some contradictions in that the members of the family who are not the worker's dependants and who are therefore less likely to become a burden for the host country, cannot take advantage of family reunification under the terms of Regulation (EEC) No 1612/68. However, members of the family who are the worker's dependants and who could possibly oblige the worker to claim social assistance from the host country, do benefit from all the advantages offered by family reunification."[114]

Furthermore, and related to the two foregoing remarks, maintaining the dependency condition as it exists effectively comes down to excluding wealthier family members of Union citizens from a right of residence in the host Member State, at least in their capacity as a family member.[115] I do not think this to be a valid policy choice: the ties between these family members may be as strong as between any family members. Lastly, not granting residence rights to non-dependent ascendants may compromise the *effet utile* of the residence rights of young Union citizens and may infringe certain of their fundamental rights, the right to respect for family life in particular. This last argument finds some support in the case law of the ECJ, as will be discussed below (see the discussion on the "primary carer", *infra* under V).

The bottom-line is that, in my opinion, if residence rights are given to ascendants and descendants of Union citizens because the absence of such a right is considered an obstacle to free movement worth removing, that should apply to dependent and non-dependent ascendants alike. The Court's rather broad interpretation of (financial) dependency is probably partly motivated by the belief that the dependency condition is not wholly justified as a limitation to free movement. In a particular set of cases, the ECJ has even left the dependency condition unapplied (see the discussion on the "primary carer", *infra* under V). Nevertheless, the Court's interpretation, apart from

---

residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State".

113 Article 24(2) of Directive 2004/38. See on this provision, ECJ, Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] E.C.R. I-4585, with a case note by Fahey in (2009) *E.L.Rev.*, 933-949 (social assistance) and ECJ, Case C-158/07 *Förster* [2008] E.C.R. I-8507, with a case note by Schrauwen in (2009) *N.T.E.R.,* 77-83 (financial support for students). See also the discussion in Ross, "The Struggle for EU Citizenship: Why Solidarity Matters", in Arnull, Barnard, Dougan and Spaventa (eds.), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Oxford and Portland, Hart Publishing, 2011), 288-292.

114 Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (COM/98/0394 final) [1998] O.J. C 344/9 . See the explanatory memorandum to the proposal, p. 10-11.

115 In that richer family members will not normally require financial support. Admittedly, as has already been remarked, they are more likely to enjoy an independent right of residence. Yet this likelihood is not such as to render the need for a derivative right as a family member nugatory. In particular for third-country family member such a derivative right would facilitate residence in the host Member State.

these particular cases, does not provide a satisfactory solution, for reasons explained above. The real solution would be a change in the secondary Union legislation on free movement of Union citizens.

It must be pointed out in this regard that the original Commission proposal for a free movement directive did no longer include the condition of dependency.[116] The Commission proposal referred in its Article 2(2), point c to "the direct descendants and those of the spouse or unmarried partner as defined in point (b)" and in its Article 2(2), point d, to "the direct relatives in the ascending line and those of the spouse or unmarried partner as defined in point (b). This new wording built on the recommendations of the High Level Panel on the free movement of persons chaired by Mrs. Simone Veil.[117] The report of the High Level Panel, to which the Commission proposal explicitly referred,[118] states that "There are no valid grounds for denying non-dependent children more than 21 years old, or relatives in the ascending line who are not dependent, the right to join their family in another Member State."[119] However, this innovation was not taken over in the final Directive, which maintained the condition of dependency for both descendants over 20 and ascendants. The Council stated in this connection that[120]:

> "As far as direct descendants and relatives in the ascending line of the Union citizen are concerned, the Council has decided to maintain the existing acquis, by reintroducing conditions of age and dependency."

Even prior to the proposal which led to the adoption of Directive 2004/38, the Commission had proposed to enlarge the circle of privileged family members of Union workers by doing away with the condition of dependency for descendants and ascendants.[121] This happened for the first time in 1988, when the Commission proposed amending Regulation 1612/68 *inter alia* with the aim to respond to the political will of the Member States to increase the protection of migrant workers and their families.[122] The proposal was finally withdrawn by the Commission on 14

---

116 Commission proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, [2001] O.J. C270E/150.

117 See the Report of the High Level Panel on the free movement of persons chaired by Mrs Simone Veil, presented to the Commission on 18 March 1997, [1998] Office for Official Publications of the European Communities, 102 pp.

118 See the explanatory memorandum to the Commission proposal, p. 8.

119 See p. 11 and 50 of the Report. This is one of the two gaps the Report recommends filling in order to allow families to remain together, the other one being the inclusion of unmarried partner in the categories of privileged family members. The Report states in this connection that "family rights should be amended to reflect social change".

120 See the "Statement of the Council's reasons" attached to Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. C54E/12.

121 See, *inter alia*, Communication from the Commission: Free movement of workers - achieving the full benefits and potential, COM(2002) 694 final 9.

122 Proposal for a Council Regulation (EEC) amending Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, COM/1988/815/FINAL. The initial proposal was twice amended by the Commission after reviews by the EP and the EESC: see [1990]

October 1998, as no agreement could be reached. At the same time, the Commission put forward a new proposal to amend Regulation 1612/68,[123] considering *inter alia* the introduction of Union citizenship [124] and the need to enhance family reunification.[125] The proposal, again, suggested to do away with the conditions of age and dependency in relation to descendants and ascendants.[126] The proposal was finally withdrawn by the Commission, after the adoption of Directive 2004/38, which repealed Article 10 of Regulation 1612/68.[127]

In sum, it is clear that both the High Level Panel on the free movement of persons and the Commission have considered that the condition of dependency in relation to descendants and ascendants should be removed from free movement legislation, either because there is no good reason to maintain it, because it is not in tune with social changes or because it leads to contradictions. Still, the Council insisted on maintaining it in the new Directive on the free movement of Union citizens, merely motivating this desire by pointing at the existing *acquis*, and the Commission accepted this by way of a "compromise".[128] The real reason why the Council was

---

C119/10 and [1990] O.J. C177/40. Article 10 of the modified proposal stated: "The following shall, even if they are not nationals of a Member State, have the right to install themselves with the national of a Member State who is employed in the territory of another Member State:
(a) the spouse or any person with similar status under the system of the host country and their descendents;
(b) relatives in the ascending line of the worker or the spouse or any person with similar status under the system of the host country;
(c) any other member of the family in the country of origin who is dependent on or living under the roof of the worker or the spouse or person with similar status under the system of the host country."
For a discussion: see Handoll *Free Movement of Persons in the EU* (Chichester, John Wiley & Sons, 1995), 249.

123 Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (COM/98/0394 final) [1998] O.J. C 344/9 . For a discussion of this proposal, see Sewandono, "Het Commissievoorstel tot wijziging van Verordening (EEG) nr. 1612/68: Meer bescherming van familie- en gezinsleven en meer gelijke behandeling" (1999) *SEW*, 284-290.

124 See Recital (2): "Whereas Article 8 of the Treaty established European citizenship; whereas freedom of movement for workers without impediment is an essential part of this European citizenship".

125 See Recital (6): "Whereas freedom of movement for workers means full and effective integration of migrant workers exercising their right to freedom of movement, and that of their families; whereas family reunification must be enhanced to ensure that the migrant worker's family is not broken up as a result of free movement".

126 See n. 116, *supra*, and accompanying text. See in this connection also the Communication from the Commission to the Council and the European Parliament on the follow-up to the recommendations of the high-level panel on the free movement of persons, COM (98) 403 final.

127 See the Communication From the Commission entitled "Withdrawal of Commission Proposals which are no longer of Topical Interest", COM(2004) 542 final/3.

128 See the Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, SEC/2003/1293 final, which states: "As regards relatives in the ascending line and descendants of the Union citizen having the primary right of residence, covered by Article 2(2)(c) and (d), the Council decided unanimously to revert to the acquis by reintroducing age and dependency conditions for descendants and relatives in the ascending line. The Commission has accepted this amendment, which was endorsed by all delegations, by way of compromise". The compromise must probably seen in relation to the whole common position, which "although less ambitious than the Commission's original proposal as amended following Parliament's

anxious to maintain the condition in the final version of Directive 2004/38 was probably the desire on part of the Member States to limit the circle of family members eligible for staying with the migrant Union citizen.[129] Since the condition is highly likely therefore to stay it must be examined how it can be usefully implemented by the Member States, having regard to their concern to limit immigration based on family reunification.

B. Implementation

As with other notions which figure in Directive 2004/38 without being explicitly defined, the transposition of the categories of dependent family members in the national laws of the Member States may give rise to difficulties. The assessment of whether a family member is dependent hinges on two important questions: 1) when can a family member be considered to be dependent, *i.e.* what standard needs to be met?[130]; 2) by what means can this dependency be proven? The judgment in *Jia*[131] clarified a number of these issues,[132] at least *in abstracto*. However, it remains unclear how the rather vague criteria put forward by the ECJ have to be implemented in practice. The concrete assessment of the condition of dependency by the authorities of the Member State remains riddled with a number of problems and uncertainties, which will have to be clarified by the Union institutions in the future. I will now turn to a discussion in some detail of the most important uncertainties.

1. Essential needs

First of all, there is the need to determine when family members are "not in a position to support themselves". The Court clarified that this entails an assessment of whether the family members in question are able to meet their essential needs without the financial support of their EU relatives.[133] As I observed higher, the Court, however, also held that that there is no need to determine the reasons for recourse to the Union citizen's support.[134] Yet, the fact that a family member is not able to satisfy his or her essential needs will in many cases constitute the reason for recourse to the Union citizen's support. In addition, it will be hard to determine what the essential needs in the country of origin or residence of the family member concerned are.[135] Naturally,

---

opinion, strikes a balance between the positions of the Member States and marks a major step forward in terms of freedom of movement and residence in relation to the existing situation" (*ibid.)*.

129 See the submission of the Swedish government in the *Jia* case, cited by Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, para. 22.

130 Remember that dependency relates to a factual situation. Consequently, the legal characterisation of a situation cannot, at least not in the first place, be relied upon.

131 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1.

132 The referring court asked clarification both in relation to the exact meaning of the condition of dependency ("substance") and in relation to the ways in which it can be proven ("proof").

133 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 43.

134 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 36. See also ECJ, Case 316/85 *Lebon* [1987] E.C.R. 2811, para. 22; Opinion of AG Geelhoed in Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 39.

135 Elsmore and Starup, "Case C-1/05, Yunying Jia v. Migrationsverket, Judgment of the Court (Grand Chamber), 9 January 2007" (2007) *CML Rev.,* 792.

there is a great variation between different countries in this regard. The essential needs of people in developing countries differ a great deal from those of the inhabitants of developed countries. This makes it impossible to give a general definition of "essential needs", for instance by way of a minimum sum of money. An individual assessment, having regard to the circumstances in the country of origin, is the only possibility to apply this criterion. The Commission's guidance for better transposition and application of Directive 2004/38 unambiguously states in this regard[136]:

> "In order to determine whether family members are dependent, it must be assessed in the individual case whether, having regard to their financial and social conditions, they need material support to meet their essential needs in their country of origin or the country from which they came at the time when they applied to join the EU citizen *(i.e. not in the host Member State where the EU citizen resides)*. In its judgments on the concept of dependency, the Court did not refer to any level of standard of living for determining the need for financial support by the EU citizen."[137]

Such an individual assessment can be difficult in practice. It is not quite clear how national courts are to be able to form a concrete idea of the essential needs in all different countries and what documents can be used for this purpose. Probably the legal (statutory) minimum subsistence of a country, in countries where this exists, is a good point of reference.[138] As AG Geelhoed remarked in *Jia*[139]:

> "It would seem to me that the appropriate test in this regard is primarily whether, in the light of these personal circumstances, the dependant's financial means permit him to live at the minimum level of subsistence in the country of his normal residence, assuming that this is not the Member State in which he is seeking to reside."

In other cases, the authorities could look at sources from the country of origin's authorities or at reports from NGOs or international organizations.[140]

---

136 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 5.

137 [The test of dependency should primarily be whether, in the light of their personal circumstances, the financial means of the family members permit them to live at the minimum level of subsistence in the country of their normal residence (AG Geelhoed in case C-1/05 *Jia*, para. 96).]

138 The Union legislator has recognised the value of the level of the minimum subsistence in a State as a valuable criterion to asses someone's resources in the framework of the assessment of the resources of a Union citizen in the host Member State. See Article 8(4) of Directive 2004/38 which states: "Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State." See similarly Article 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12. On that provision, see the important case ECJ, Case C-578/08 *Chakroun* [2010] E.C.R. nyr.

139 Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, para. 96.

140 Oosterom-Staples, "Van dingen die maar niet voorbijgaan; toelating van derdelander familieleden van burgers van de Unie en ongewenstverklaring van burgers van de Unie" (2007) *N.T.E.R.,* 197.

2. Financial and social conditions

Second, it is unclear what elements Member States are allowed to take into account when assessing whether a family member is financially dependent. The Court states that Member States need to have regard to the "financial and social conditions" of the family members concerned,[141] without specifying these. As far as financial conditions are concerned, this would seem to refer to the financial resources of the family member concerned, *i.e.* his or her savings, his or her professional income, the social security benefits or pensions he or she receives *etc*. More broadly, it could be taken to refer to an assessment of the possibility for the family member concerned to be self-sufficient, *i.e.* to his or her ability to generate sufficient income to provide for his or her essential needs. That assessment could take into account the professional qualifications of the family member, the job-market of his state of residence, his or her job prospects (in case he or she is unemployed) and the social security benefits he or she could apply for. However, as I have already explained, the Court has consistently held that that there is no need to raise the question whether the family member concerned was able to support himself by taking up paid employment.[142] The Commission has even stated this in broader terms: "There is no need to examine whether the family members concerned would in theory be able to support themselves, *for example* by taking up paid employment (italics added)."[143] It seems, therefore, that only the first (narrower) interpretation of "financial conditions", as referring to the family member's actual resources is in accordance with the ECJ's case law.

As for "social conditions", this probably refers to elements such as the age, family composition, employment situation *etc*. of the family member concerned. The age of a family member may be considered a relevant "social condition" to determine dependency since older ascendants are more likely to be dependent on the support of their relatives than younger ones. However, in my view, Member States cannot, under Union law, make the right of residence of dependent ascendants dependent on attaining a certain age. If the Union legislator had wanted to restrict the category of ascendants to persons above a certain age, it would probably have inserted that condition explicitly in Union legislation, like it has done for descendants.[144] Moreover, the intention behind imposing the age condition is probably to exclude ascendants who still have good opportunities to support themselves by exercising a profession. However, as pointed out above, Member States may not consider relevant whether a family member could support himself by taking up paid employment. For that reason, it would be problematic for Member State authorities to make a right of residence for ascendants dependent on having reached the legal age of retirement. In

---

141 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 37.

142 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 36. See also ECJ, Case 316/85 *Lebon* [1987] E.C.R. 2811, para. 22; Opinion of AG Geelhoed in Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 39.

143 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 5.

144 Oosterom-Staples, "Van dingen die maar niet voorbijgaan; toelating van derdelander familieleden van burgers van de Unie en ongewenstverklaring van burgers van de Unie" (2007) *N.T.E.R.,* 198.

sum, age can be a factor taken into account to determine dependency, but cannot constitute a *conditio sine qua non* for entitlement to residence.

As far as the family situation of the family member is concerned, account could be taken, for instance, of whether the family member is single or in a relationship and whether some of his or her children (or further descendants) live in his or her country of residence. The first element would seem to be relevant *prima facie* because couples are generally less in need of financial support than persons who are not in a relationship. On the other hand, the right of residence can not be made dependent on "being single" since that condition would be hard to reconcile with Union law, which grants a right of residence to all dependent ascendants. Accordingly, the relationship status of a family member can be taken into account by national immigration authorities as one factor which makes dependency convincing, but cannot constitute a *conditio sine qua non* for entitlement to residence. The second element (whether other descendants are living in the country of residence of the family member) seems relevant since they could be supporting the family member in question and thus the latter would not have to rely on his Union relative living in one of the Member States. In my view this element could legitimately be taken into account by immigration authorities. Of course, they will need to look into the financial resources of the relatives living in the State of origin and their family situation in order to determine whether there is a realistic possibility for them to financially support their ascendant. They cannot content themselves with the theoretical possibility that these relatives could support their ascendant, as hypothetical situations may not be taken into account.

Lastly, the state of health/medical condition of the family member could be considered an important social condition. An ascendant in bad health can be supposed to be more in need of financial support of his relatives in order to have a decent life quality. The Union legislator has explicitly recognised the health condition of a family member as an important factor to grant a right of residence in Article 3(2) of Directive 2004/38, which states:

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come […] where serious health grounds strictly require the personal care of the family member by the Union citizen;"

Admittedly, Article 3(2) of Directive 2004/38 relates to persons falling outside the categories of privileged family members, and, hence, does not cover the categories of dependent descendants and ascendants. Still, in my view, the medical condition of a family member is also relevant for the residence rights of those categories insofar as it may indicate the need for *financial* support on the part of Union relatives, whereas the determining factor in Article 3(2)(a) is rather the need for *personal* care. I admit, this is stretching the term "social conditions", but in my view it should be so interpreted. If this is not accepted, the person concerned will still be able to invoke a right of residence on the basis of Article 3(2)(a) of Directive 2004/38.

A related question is against what time-frame Member States are to carry out this assessment of financial and social conditions. This comes down to the question of at what moment and for what period of time there should be a need of financial support. On the one hand, it could be argued that the need for financial support should not be temporary, but should be lasting.[145] In other words: the problematic social and financial conditions of the family member should be structural. This position was defended by AG Geelhoed in his opinion in the *Jia* case.[146] The ECJ, by contrast, did not explicitly state this condition of a structural rather than a temporal need for support and merely stated that the need for material support must exist at the time when the family member applies to join the Union citizen.[147] The Commission in its guidance clarifies that:

> "The Directive does not lay down any requirement as to the minimum duration of the dependency or the amount of material support provided, as long as the dependency is genuine and structural in character."[148]

The bottom-line is probably that the need for financial support must a) exist at the moment the family member applies for residence in the host Member State and b) be structural. This last condition does not, however, mean that the state of need has existed for a longer period of time. If, for instance, a family member suffers a grave health condition, he or she may be in an acute and lasting need of financial support, even though this situation has not existed for a long time.

3. Implementation in Belgium

To get a better understanding of these issues, it is illuminating to look at how the authorities of a Member State apply the condition of dependency in practice. I consider the example of Belgium in some detail here. In Belgium, the law of 15 December 1980 on the admission to the territory, the residence, the establishment and the removal of foreigners[149] states the same condition of dependency for both descendants over 20 and ascendants.[150] The notion of dependency ("te hunnen laste"/"à leur charge") is not, however, explained or elaborated upon. This leaves the

---

145 In *Jia,* the Swedish authorities had rejected Mrs. Jia's application for a residence permit because they were not satisfied that she was a financially dependent family member in the sense of Union free movement law, pointing out *inter alia* that there needed to be a real and continuous need for material support, not an occasional need or acceptance of financial contributions (ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 21).

146 See Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, para. 96.

147 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 37.

148 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final.

149 Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, (1980) *B.S.* 14584, *available at* http://www.ejustice.just.fgov.be/cgi_wet/wetgeving.pl. For a discussion, see the contributions in Foblets, Maes and Vanheule (eds.), *30 jaar Vreemdelingenwet* (Bruges, Die Keure, 2011), 682 pp.; Sarolea, "Le nouveau visage du droit au regroupement familial après deux années de réforme" (2008) *Revue trimestrielle de droit familial,* 361-387; Foblets and Vanheule, "Het federale vreemdelingenbeleid in België: enkele recente wetswijzigingen" (2007) *TBP*, 387-408.

150 See Article 40bis § 2 of that Act.

exact interpretation of this notion to the Belgian immigration authorities (the "Dienst Voor Vreemdelingenzaken/Office des étrangers", *hereinafter* "DVZ")[151] and the Belgian courts.[152] The DVZ considers the following criteria relevant to determine whether a dependent family member has a right to reside in Belgium[153]: 1) the revenue of the Union citizen concerned; 2) the revenue of the family member[154]; 3) proof that the family member was financially supported by his or her Union relative for at least six months prior to the request for family reunification[155]; 4) the age of the family member; 5) proof of insufficient resources ("Bewijs van onvermogen"/certificat d'indigence); 6) whether the family member has family members dependent on himself or herself. The fifth criterion comes down to proving the lack of own revenue and the lack of house ownership.

These are different elements which can be taken into account, rather than cumulative conditions for entitlement to residence. It is clear that the Belgian immigration authorities have sought a reasonable way to apply the requirement of dependency in practice. Still, it must be pointed out that a number of the above criteria can pose problems under Union law. First of all, it appears that the DVZ uses a fixed income level to determine whether a Union citizen has sufficient means to avoid dependent persons becoming a burden on the social assistance system of the host Member State. While this is apt to provide legal certainty, it seems contrary to the ECJ's case law holding that every case has to be judged according to its individual circumstances rather than tested against generally applicable benchmarks.[156] Moreover, in my view, the fact whether a Union citizen has sufficient means is not in itself apt to assess whether the condition of "dependency" is satisfied. It is relevant for the assessment of another condition, namely that of self-sufficiency, *i.e.* whether a Union citizen has sufficient resources to support himself and his family members. Both conditions, namely the condition of dependency and that of self-sufficiency, seem to be conflated to some extent by the Belgian authorities. This is clearly apparent in a recent judgment of the Belgian Constitutional Court. The Constitutional Court considered that the aim pursued by the condition of dependency, as inscribed in the Belgian law of 15 December 1980, is to

---

151 For more information, see the website of this institution: http://www.dofi.fgov.be/.

152 See, for instance, the recent judgment of the Belgian Constitutional Court of 3 November 2009 in Case No. 174/2009, *Villamar e.o. v. Council of Ministers*, with a case note by Denys in (2010) *T.Vreemd*. 47-49, at para. B.9 in particular.

153 These are internal criteria, which have not been officially published. They are described, however, in authoritative Belgian legal literature. See *e.g.* Walleyn, "Gezinshereniging na de grote hervorming" (2008) *T.Vreemd*, 252-253; Walleyn, "Recente rechtspraak over ouders van Belgische kinderen in onregelmatig verblijf" (2006) *T.Vreemd*. 403-406; X., "Het begrip "ten laste zijn" in het kader van gezinshereniging", *vreemdelingenrecht.be,* http://www.vmc.be/vreemdelingenrecht/wegwijs.aspx.

154 The mere fact that a person's pension or revenue is below the average income in a third country does not suffice in itself to proof the need for material support (Raad voor Vreemdelingenbetwistingen, Case 31.564 *X/Belgium* (decision of 15 September 2009)).

155 This will normally require bank statements proving that the Union citizen transferred substantial sums of money to his or her family member abroad which amount to structural support. It is not sufficient merely to demonstrate that the family member abroad has received sums or gifts (see Raad voor Vreemdelingenbetwistingen, Case 31.564 *X/Belgium* (decision of 15 September 2009)).

156 See also EU CITIZENSHIP REPORT 2010, Dismantling the obstacles to EU citizens' rights, COM(2010) 603 final (stating, at p. 14: "Several Member States apply EU rules incorrectly as they use fixed amounts as a criterion for residence or do not take individual circumstances into account.").

> "avoid that the [host] State has to bear the financial burden of foreigners who reside on its territory by virtue of family reunification with their […] Belgian relatives in the descending line, while the latter cannot themselves bear that burden."[157]

In my view, this aim is pursued by the condition of self-sufficiency rather than that of dependency. It would be better to make a clear distinction between the two conditions, as Directive 2004/38 does, since they serve different purposes. As I explained above, concerns relating to the financial burden incurred by the host Member State by the immigration of family members of Union citizens can be met by a sensible application of the requirement of self-sufficiency and that of the possession of comprehensive sickness insurance. Such concerns should not be taken into account when assessing the condition of dependency. Accordingly, the Belgian authorities are, in my view, wrong to take the revenue of the Union citizen into account in this connection.

Second, as Union legislation does not require a minimal duration of dependency, the proof of six months of financial support may be in violation of Union law.[158] Third, the element of age can be problematic if it is applied as a condition of having reached a certain age.[159] Lastly, the condition of absence of home ownership is probably based on the assumption that a home owner could always sell his house in order to generate sufficient income. As such, it may be considered to be a relevant financial condition. However, it may hurt the problem that it takes into account a hypothetical situation and not the actual financial situation of the family member.

In sum, the Belgian authorities take into account elements which mainly relate to the financial conditions of the family member, namely his or her revenue, whether he or she is a home owner and how much support he or she received in the nearby past. As to social conditions, the Belgian authorities seem to consider only the age of the family member concerned. A number of these elements can be problematic under Union law, depending on how they are interpreted and assessed. Besides, the Belgian authorities seem not to take into account other elements which seem to be pertinent in this regard, such as the health condition of the family member concerned.[160]

---

157 Judgment of the Belgian Constitutional Court of 3 November 2009 in Case No. 174/2009, *Villamar e.o. v. Council of Ministers*, with a case note by Denys in (2010) *T.Vreemd*. 47-49, at para. B.9 "…die erin bestaat te vermijden dat de Staat de financiële last moet dragen van vreemdelingen die op zijn grondgebied verblijven krachtens een gezinshereniging met hun […] Belgische bloedverwanten in neergaande lijn, terwijl laatstgenoemden niet zelf kunnen instaan voor die last." (English text quoted is my translation).

158 See the Commission guidance (at p. 5): "The Directive does not lay down any requirement as to the minimum duration of the dependency or the amount of material support provided, as long as the dependency is genuine and structural in character". The Belgian "Council for Alien Law Litigation" (Raad voor Vreemdelingenbetwistingen), by contrast, takes the position that dependency only exists where a family member was supported "for a certain period of time" (see Raad voor Vreemdelingenbetwistingen, Case 7.173 (decision of 15 September 2009)).

159 See under III.B.2., *supra*.

160 The only way in which the health condition of family members seems to be taken into account is by the requirement that family members must demonstrate that they do not suffer from certain infectious diseases (see Articles 10(2), sixth subpara., and 43(4) of the Law of 15 December 1980).

4. Proof

Lastly, it will be very difficult for the Member States to determine exactly what documentary evidence can be asked to proof dependency.[161] On the one hand, the ECJ has held that evidence may be adduced by any appropriate means and that Member States may not insist on an official document issued by the relevant authorities of the country of origin or residence of the family members.[162] On the other hand, Member States need not accept a mere undertaking from the Union citizen or his spouse as sufficient proof.[163] The question arises, therefore, what documents can be demanded. The Commission guidance does not at all clarify this issue, but only summarises the Court's case law in this respect.[164] In any event it is clear that Member States may not require one specific type of documentary evidence. Nevertheless, it may be assumed that an official document from the competent national authorities of the third country will in most circumstances be considered the most appropriate way of proving dependency,[165] although it may not always be conclusive.[166] In the absence of such a document, or in addition to it, the authorities of the host Member State may take into account, for instance, bank statements from the family members concerned (possibly proving the lack of sufficient resources), a Declaration of bankruptcy (possibly proving the absence of professional income) or an Act of expropriation (possibly proving the absence of suitable housing) *etc*.[167] In the absence of the possibility for Member State to exhaustively enumerate the types of documentary evidence required/accepted, it will be the task of the Union citizen concerned to make his case as strong as possible and provide the necessary documentary evidence to convince the authorities of the host Member State.

C. Conclusion

The conclusion must be that the notion of dependency is rather clear on a fairly abstract level. It concerns material dependency which may be proven by any

---

161 Oosterom-Staples, "Van dingen die maar niet voorbijgaan; toelating van derdelander familieleden van burgers van de Unie en ongewenstverklaring van burgers van de Unie" (2007) *N.T.E.R.,* 198; Woltjer, "Zaak C-1/05, Jia" (2007) *SEW,* 305.

162 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1*,* paras 41-42. The Court did acknowledge however that such a document would be "particularly appropriate" for the purpose of proving dependency (*Ibid.*). By contrast, Directive 2004/38 states that dependants or members of the households of the Union citizen who do not fall within one of the categories of "privileged family members" (one of the categories of "other family members" mentioned in Article 3(2)(a)) may be required by the host Member State to produce *inter alia* "a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants in order to obtain a residence card" (Directive 2004/38, Article 10(2)(e)). AG Geelhoed referred to Article 4(3)(e) of Directive 68/360 in this connection (Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, para. 97).

163 ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 42.

164 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 5.

165 See ECJ, Case C-1/05 *Jia* [2007] E.C.R. I-1, para. 41.

166 Opinion of AG Geelhoed in Case C-1/05 *Jia* [2007] E.C.R I-1, para. 98.

167 Oosterom-Staples, "Van dingen die maar niet voorbijgaan; toelating van derdelander familieleden van burgers van de Unie en ongewenstverklaring van burgers van de Unie" (2007) *N.T.E.R.,* 198.

appropriate means. To determine material dependency, Member States must look at the financial and social conditions of a Union citizen's ascendant in an individual case and determine whether he or she is able to provide for his or her essential needs in his or her country of residence. For the moment there is still some uncertainty as to what elements Member States may take into account and how insistent they may be on the level of proof required. Accordingly, it is difficult to give a sensible implementation of this notion under national law.

The condition of dependency as it is currently interpreted does not strike a proper balance between the financial interests of the Member States and the need to guarantee the effective free movement of Union citizens and their family members. The ECJ's interpretation is both too narrow, in that it refuses to take into account a number of elements which should be central to the assessment of dependency, such as emotional connections, and too broad, in that it refuses to inquire into the underlying reasons for dependency. In addition, even after the recent clarifications brought about by ECJ case law, it remains a vague notion, difficult to implement by the Member States. It may be preferable in the future to drop the dependency condition altogether, for reasons set out above in detail.

IV PRIMARY CARER

As will be clear from the foregoing, direct ascendants of a Union citizen may only join or accompany the latter in the host Member State if they are dependent on him or her. Somewhat curiously, however, the ECJ has been prepared, in certain circumstances, to leave the condition of dependency unapplied. In a number of fairly recent cases, the ECJ has held that the parent of a Union citizen was entitled to reside in the host Member State despite the fact that this parent was not dependent on the latter. The Court justified this holding in each of these cases by pointing out that the parent concerned was the "primary carer" of the Union citizen.

The said case law is rather puzzling, in particular having regard to the fact that the Council *expressis verbis* reintroduced the condition of dependency in the final text of the Directive. In the following I will try to provide an answer to three questions. First, I will consider whether and to what extent the stance of the ECJ can be justified (*i.e.* are there good reasons to enlarge the category of ascendants, even against the apparent will of the legislator? Does the ECJ strike an appropriate balance between the interests of Union citizens and those of the Member States?). This will bring me, second, to an assessment of the scope of this case law (*i.e.* given the (absence) of justifications for the stance of the ECJ in these cases, what is the scope of the principles underlying them?). Lastly, and again related to the previous question, this will provide me with insight as to the obligations of the Member States under Union law with regard to family reunification (*i.e.* at the end of the day, which ascendants are entitled to residence?). In this connection, I will analyse the implementation of Directive 2004/38 by the UK.

A. Justification

Prima facie, and without wanting to pre-empt the discussion below, it seems that the ECJ in the said cases added a new category of "derivative" ascendants whose relation to the "primary" beneficiary was not one of dependency, but rather lies in the fact that these persons "care" for the primary beneficiary. This is a very interesting point, because the "care element" does not figure (and has never figured) in secondary Union law dealing with free movement of persons. This can mean two things: either the Union legislator overlooked it when laying down the rules on free movement, or it considered it just not to be relevant. The last point was clearly articulated by AG Stix-Hackl in *Carpenter*, one of the cases in point.[168] The AG noted[169]:

> "103. As the Commission rightly submits, the circumstance that Mrs Carpenter cares for Mr Carpenter's children and thus indirectly assists him to exercise the rights deriving from the freedom to provide services has nothing to do with the question whether Mr Carpenter has exercised his rights in such a way that his spouse comes within [Union] law.
> 104. The relevant provisions of secondary [Union] law also argue against the circumstance that the spouse cares for the children of the citizen of the Union being legally relevant for the right of residence. Thus the relevant Directive 73/148 refers in Article 1(1), with respect to its scope, to a series of circumstances such as the degree of relationship, age, dependency and living together as a household. The care of children is not included in this - exhaustive - list. It may be concluded that the [Union] legislature manifestly attached no importance in this connection to caring for children."

In the following I will argue that the ECJ is justified in taking the element of "care" into consideration. I can see two justifications for extending the right to free movement and residence to the "primary carer" of Union citizens. The first one lies in the need to preserve the *effet utile* of the free movement provisions. The second lies in the need to respect Article 8 ECHR. I will now turn to a detailed discussion of these justifications on the basis of the cases referred to.

1. Effet utile

The principle of *effet utile* ("useful effect") is a very powerful concept in Union law. The principle appears under different forms and names (for example: "principle of effectiveness"). In its most basic form, it refers to the need to guarantee that Union law can be usefully applied, *i.e.* that Union rules are fully given the effect they envisage. As such, it is closely linked to the principle of sincere cooperation laid down in Article 4(3) TFEU. That principle, in turn, finds its concrete expression in different contexts, in which the Courts have often justified certain obligations on part of the Member States by referring to the principle of *effet utile*. This is the case, for instance, with the principle that national courts applying Union law must have jurisdiction to do everything necessary to set aside provisions of (even constitutional) law which might prevent Union rules from having full effect[170] or with the duty of even administrative bodies to disapply conflicting procedural rules of national law in

---

168 The relevant facts of the case are set out in more detail below (*infra*, under IV).

169 Opinion of AG Stix-Hackl in Case C-60/00 *Carpenter* [2002] E.C.R. I-6279. Admittedly, the case was decided before the adoption of Directive 2004/38, but the latter has not changed anything in this connection.

170 ECJ, Case 106/77 *Simmenthal ("Simmenthal II")* [1978] E.C.R. 629, para. 22; ECJ, Case C-213/89 *Factortame (Factortame I)* [1990] E.C.R. I-2433, para. 20.

order to give full effect to Union law[171] and the principle by which a Member State must be liable for loss and damage arising out of breaches of Union law for which it can be held responsible.[172]

The concept of *effet utile* is also a very important one in the Court's case law on the free movement of persons. In this context it essentially means that Union rules conferring free movement rights on individuals must be interpreted in such a way that they do no make it "impossible or excessively difficult" to exercise those rights and that national measures having that effect must be disapplied. The Court will verify whether measures restricting the exercise of free movement rights can be justified and whether they do not restrict the exercise of these rights further than necessary to achieve the aim they pursue, *i.e.* whether they are in accordance with the principle of proportionality. The ECJ's concern to safeguard the *effet utile* of the provisions on free movement of citizens is clearly apparent, for instance, in a number of cases in which the ECJ invalidated certain requirements imposed by Member States on nationals from other Member States.[173] Accordingly, and just to illustrate the point, the ECJ invalidated measures imposing requirements relating to the *origin* of the financial resources of Union citizens[174] or a national measure denying a Union citizen a right of residence in the case of only temporal financial difficulties.[175]

a) Zhu and Chen

The need to preserve the *effet utile* on the provisions on free movement and residence of Union citizens was also the main consideration that led the Court in *Zhu and Chen* to grant a right of residence to Mrs. Chen. The ECJ was confronted with the question whether Mrs. Chen, a Chinese mother of a young baby having the Irish nationality could invoke a right of residence in the UK under secondary Union law.[176] One of the main hurdles to her case was that she, strictly speaking, did not fall within one of the categories of family members provided for by Article 1(1) of Directive 73/148 (now replaced by Directive 2004/38). Notably, she was not an ascendant "dependent" on the Union citizen in question,[177] her newly born baby named Catherine. Rather the reverse was true: her baby was completely dependent on her. The ECJ nevertheless considered that Mrs. Chen was entitled to a right of residence, explaining that to refuse a right of residence to the parent who is the primary carer of a child entitled to

---

171 ECJ, Case C-118/00 *Larsy* [2001] E.C.R. I-5063, paras 50-53.

172 This is confirmed by a large body of case law on State liability. See, *e.g.*, ECJ, Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] E.C.R. I-5357. At paragraph 33 the Court states: "The full effectiveness of [Union] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [Union] law for which a Member State can be held responsible."

173 See the discussion in Van Nuffel and Cambien, "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren" (2009) 57 *SEW*, 144-154.

174 *E.g.* ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 29-33; ECJ, Case C-408/03 *Commission v Belgium* [2006] E.C.R. I-2647, paras 38-53.

175 ECJ, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, paras 43-44.

176 The facts of the case are set out in more detail in Chapter 2, *supra*.

177 Article 1(1)d) of Directive 73/148 included ascendants on condition that they were dependent just like Article 2(2)d) of Directive 2004/38; it read as follows "the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality."

reside in the host Member State, would deprive the child's right of residence of any useful effect.[178]

It is hard to disagree with the Court on this point: as a very young child, baby Catherine was completely dependent on the care of her mother and could certainly not reside in one of the Member States on her own. The Court was right, therefore, to leave the condition of dependency unapplied in the specific circumstances of the case.[179] However, the Court's reasoning on this point is rather succinct, unlike most of the other judgments based on *effet utile* reasoning. It is certainly striking that the Court did not explicitly consider whether and to what extent the restrictive condition of dependency could be justified by a legitimate purpose. The reason for this seems rather obvious. The application of the condition, in the case at hand it had the effect of completely rendering impossible the exercise by a Union citizen of her fundamental right to fundamental freedom, even though the conditions of financial independence were fulfilled. Since no purpose could conceivably justify such a far-reaching interference, the ECJ can be forgiven for not explicitly considering it. Still an explicit consideration of this point would have brought more clarity to the ECJ's reasoning and provided more insight into its scope.

For the sake of completeness, it must be mentioned that the Court has confirmed the reasoning followed in *Zhu and Chen* in its recent judgment in case *Ruiz Zambrano*.[180] The question the Court had to answer in that case was whether a Colombian national and his young children, who had the Belgian nationality, derived from Union law a right of residence in Belgium. The applicant explicitly based his claim on *Zhu and Chen*, which concerned similar facts. The only doubtful element about his claim was that, to the difference of the *Zhu and Chen* case, the Union citizens in question had never resided outside Belgium, the Member State of which they were a national. Before the ECJ it was argued by no less than eight Member States and by the Commission that the case therefore fell outside the scope of Union law. The Court nevertheless decided that Mr. Ruiz Zambrano and his children derived a right of residence from Union law. It pointed out that the children would not be able to reside in Belgium independently and that, consequently, the refusal of a right of residence to their father would require them to leave the country and thereby deprive them of the genuine enjoyment of the substances of the rights conferred on them by virtue of their status as Union citizens. Such outcome would be at variance with Article 20 TFEU, according to the Court.

It is certainly striking that the Court in *Ruiz Zambrano* did not explicitly use the term "primary carer"[181] and did not on this point refer to the *Zhu and Chen* case, in particular in view of the fact that *Zhu and Chen* was explicitly referred to in two of the three questions referred for a preliminary ruling. However, it should be clear that the Court's reasoning on the point that the children of Mr. Ruiz Zambrano could not reside in Belgium independently of the latter was analogous to the reasoning followed

178 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 45-46.

179 Below, it will be further discussed what the scope of the judgment is and to what extent the Court's judgment was predicated on the very specific facts of the case.

180 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr. See the detailed discussion in Chapter 4, *supra*.

181 Instead it used the term "third country national with dependent minor children" (ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 43).

in *Zhu and Chen*. The Court's reasoning on this point in *Ruiz Zambrano* was in fact strikingly succinct, perhaps indicating that the Court considered that the reasoning followed was well established since the *Zhu and Chen* case and did not require further elaboration. In any event, the judgment in *Ruiz Zambrano* did not contribute much to a better understanding of the legal position of primary carers under Union law and will therefore only be referred to sporadically below.

In the following, I will discuss a number of other cases in which the Court also applied a reasoning based on the need to preserve the *effet utile* of the free movement provisions in order to grant a right of residence to the parent who is the primary carer of his or her children, namely *Baumbast and R, Ibrahim* and *Texeira*, and *Carpenter*. These cases are different from *Zhu and Chen* in that they concern the residence rights of family members of economically active Union citizens.[182] This may *prima facie* seem to make them less relevant for my analysis of the free movement of Union citizens. Still, they can, on a proper account, be characterised as "citizenship cases". This is crystal clear for *Baumbast and R, Ibrahim* and *Teixeira*, where the applicants where non-economically active Union citizens,[183] but the same is arguably also true for *Carpenter*.[184] Moreover, it could be argued that economic activity is not a relevant distinguishing criterion in this context. After all, Directive 2004/38 harmonises the definition of family members for the purposes of free movement of persons for both economically active and non-economically active persons. Still, there are clear indications in the case law of the ECJ that the qualification of the case as one involving economically active citizens could have significant consequences for the residence rights of children and their primary carer. This will be discussed in detail below (see *infra*, under IV.B.2.a.).

b) Baumbast and R

Baumbast and R[185] in fact concerned two cases in which migrant workers who resided in the UK together with their school-going children were denied the right to (continue to) reside in the UK. In the *Baumbast* case, the refusal was based on the fact that Mr. Baumbast, a German national, did no longer have a job in the UK and thus could no

---

182 Or Union citizens who were formerly economically active in the host Member State.

183 It must be remarked in this connection that *Ibrahim* and *Teixeira* are cases in the field of "European citizenship" according to the official classification of cases of the Union Courts (see www.curia.eu).

184 See *e.g.* Spaventa, "From Gebhard to Carpenter: Towards a (non-)economic European Constitution" (2004) 41 *CML Rev.,* 773; Spaventa, *Free movement of persons in the European Union: Barriers to Movement in their Constitutional Context* (Alphen aan den Rijn, Kluwer law international, 2007), 126-127.

185 ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, with case notes by Martin in (2003) *Eur. J. Migration & L.*, 143-162; Sewandono in (2003) *SEW*, 73-75; Storey in (2002) *Journal of Civil Liberties*, 152-162; Azoulay in (2001-2002) *R.A.E.-L.A.E.*, 1092-1101. See also the interesting recent contributions in M. Poiares Maduro and L. Azoulay (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford and Portland, Hart, 2010): Timmermans, "Martínez Sala and Baumbast revisited" (p. 345-355), Shaw, "A View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union" (p. 356-362), Menéndez, "European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?"(p. 363-393), Closa Montero, "Martínez Sala and Baumbast: an institutionalist analysis" (p. 394-401).

longer be considered a migrant worker for the purposes of Regulation No 1612/68.[186] In the *R* case the refusal was based on the fact that Mrs. R, a third country national who had been married to a French national, was divorced from her husband, and thus could no longer be considered the spouse of a migrant worker for the purposes of Regulation 1612/68.[187] In both cases the ECJ considered that the children of Mr Baumbast and Mrs. R were entitled to reside in the UK, despite the fact that they could at the relevant time no longer have been considered children of migrant worker. The Court based this finding on Article 12 of Regulation 1612/68, which entitles children of migrant workers to be admitted to the host Member State's general educational, apprenticeship and vocational training courses under the same conditions as nationals of that State.[188] The Court held that it would be contrary to the wording of Article 12 and to its objective, namely to facilitate the integration of the children of a migrant worker and his family in the host Member State, to refuse the children in question a right of residence in the host Member State. Furthermore, the Court considered that the right of the children to pursue their studies in the host Member State would be infringed if permission to remain were refused to the parents who are their primary carer. The Court stated[189]:

> "The right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right."

The Court's reasoning is similar to its reasoning in *Zhu and Chen.*[190] In *Baumbast and R* too, the primary carer was entitled to reside in the host Member State, because otherwise the residence rights of the children, which *in casu* were necessary to enable them to go to school in the host Member State, could not be usefully exercised. Again, the Court came to this conclusion despite the fact that, strictly speaking, Mr. Baumbast and Mrs. R did not fall within the scope of the beneficiaries of Regulation 1612/68, as they were no longer (the spouse of) a migrant worker. At the same time, the Court did rather more to justify its refusal to strictly apply secondary free movement law than in the *Zhu and Chen* case. It pointed out that, in order to facilitate

---

186 In addition, the Immigration Adjudicator considered that Mr. Baumbast did not fulfil the conditions to be entitled to a general right of residence under Directive 90/364. I will not discuss that issue in this context, as it concerns the residence right of Mr. Baumbast in his own right, and not as a family member, with which I am concerned here. For a good analysis of that issue, see Dougan and Spaventa, "Educating Rudy and the (non-)English Patient: A Double-Bill on Residency Rights under Article 18 EC" (2003) 28 *E.L. Rev.*, 699-712.

187 After her divorce, Mrs. R married a UK national. In her capacity as spouse of a UK national she was most probably entitled to reside in the UK, as was remarked by the ECJ (ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 29). This element is of no importance however to the further discussion of the case, which concerns her entitlement to reside in the UK as mother of children not having the UK nationality but residing in the UK.

188 Article 12 states: "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."

189 ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 73.

190 Not surprisingly, *Baumbast and R* is referred to by the Court in *Zhu and Chen*.

the free movement of workers, the Union legislator had taken into account the importance for the worker, from a human point of view, of having his entire family with him and the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that Member State.[191] More in particular, it pointed out that the purpose of Article 12 of regulation 1612/68 was to ensure that children of a Union worker can, even if he has ceased to pursue the activity of an employed person in the host Member State, undertake and, where appropriate, complete their education in that Member State.[192] It considered that this purpose could not be achieved if Mr. Baumbast and Mrs. R were refused a right of residence in the home Member State, because such would necessarily mean that the children could no longer reside there either, as they were dependent on their primary carer. In addition, the Court justified its position by referring to Article 8 ECHR, a point which will be discussed below (see IV.A.2).

It is, in my opinion, no coincidence that the Court in *Baumbast and R* did more to justify its reasoning: the case for an *effet utile* reasoning was weaker than in *Zhu and Chen.* Indeed, the provision the effectiveness of which had to be preserved in *Zhu and Chen* was essentially Article 21 TFEU, which lays down one of the most fundamental rights of Union citizens. In *Baumbast and R*, by contrast, the effective application of Article 12 of Regulation 1612/68 was at stake. That provision merely grants a right to education in the host Member State and not, according to a strict reading of the provision, a right of residence in the host Member State. More importantly, it confers a *derivative* right on the descendents of a Union worker, who is the primary beneficiary of the right to free movement. One could have expected, therefore, that considerations relating to the exercise of the primary beneficiary of the free movement right should have been at the centre of the ECJ's *effet utile* reasoning. In other words: one would have expected the Court to consider to what extent the application of Article 12 was needed to safeguard the free movement of the primary beneficiaries in question.

The Court, however, proceeded the other way around, at least in the *Baumbast* case. It first established the right of residence for school-going children of migrant workers and, from there on, established a right of residence for the primary beneficiary of the fee movement provisions, namely the migrant worker himself.[193] This upside down approach could be criticised for being circular in nature, because *prima facie* the primary carer (Mr. Baumbast) derived a right of residence from the situation of his children, who in turn derived their residence from the Union worker status of Mr. Baumbast. It is precisely against such a circular type of reasoning that the Commission spoke out when it stated in its submission to the case that:

> "a right of residence cannot be derived from Article 12 of Regulation 1612/68 in favour of a person who is not the child of a migrant worker, on the ground that possession of that status is a *sine qua non* of any right under that provision, having regard to its context and the objectives pursued by Regulation 1612/68 and in particular Article 12 thereof."[194]

---

191 ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 68.
192 ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 69.
193 Although, admittedly, Mr. Baumbast was no longer a migrant worker. Still, precisely the fact that he was a former migrant worker made reliance on Regulation 1612/68 possible.
194 ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 74.

The ECJ merely replied to that argument that Article 12 of the Regulation should not be interpreted restrictively and must not, under any circumstances, be rendered ineffective.[195] What the Court probably meant by this is that *once* children of a migrant worker have obtained a right to education in the host Member State, they obtain an independent right of residence, which is not conditional, for instance, on their parent retaining the status of migrant worker. This was made abundantly clear by the Court in its judgments in *Ibrahim* and *Teixeira*, in which the Court reverted to its reasoning in *Baumbast and R* (see the discussion under IV.A.1.c., *infra*).

The foregoing makes clear why the reasoning followed by the Court in *Baumbast and R* is not circular. Children of migrant workers admittedly derive their initial right of residence in the host Member State from the worker status of one of their parents. Once they are enrolled in an educational establishment, however, they derive their right of residence in the host Member State from the fact that they are going to school there and need to be enabled to continue their schooling in that State. This, in turn, may give entitlement to residence to one of their parents who is their primary carer, regardless of whether he or she (still) has the status of migrant worker. Indeed, when the need to safeguard the residence rights of children of migrant workers – as a factor promoting integration of the worker's family in the host Member State and thus facilitating free movement of workers – is taken as the focus of the analysis, the Court's reasoning becomes convincing. The *effet utile* of those rights would be compromised if children could not be accompanied by the parents responsible for their care in the host Member State. In this regard, the *effet utile* reasoning followed by the Court in *Baumbast and R*, on the one hand, and, *Zhu and Chen*, on the other hand, was in essence the same. In both cases the Court was essentially concerned with safeguarding the residence rights of young children. It refused to see these rights as merely accessory to or conditional on the right of residence of their parents. This reasoning was further accentuated in two parallel cases of 2010 with similar facts, namely *Ibrahim and Teixeira*.

c) Ibrahim and Teixeira[196]

The applicants in both cases entered the UK as the spouse of a Union migrant worker, together with their children. Consequently, both women separated from their husband[197] and continued to live independently in the UK, together with their children. At some point in time, both women applied for housing assistance for themselves and for their children. Their application was rejected because, according to the competent UK authority, they were not entitled to reside in the UK under Union

---

195 ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 74.

196 ECJ, Case C-310/08, *Ibrahim* [2010] and ECJ, Case C-480/08 *Teixeira* [2010], with case notes by Cambien in (2010) *SEW*, 416-419, Starup and Elsmore in (2010) *E.L.Rev.*, 571-1160, Schrauwen in (2010) *N.T.E.R.,* 231-237 and O'Brien in (2011) 48 *CML Rev.,* 203-225. See also (preceding the judgments of the Court) Currie, "EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law" (2009) *Journal of Social Security Law*, 76-105.

197 The applicant in *Teixeira* had even divorced from her husband (ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, para. 20).

law.[198] This view was based on the fact that the applicants were not self-sufficient or covered by comprehensive sickness insurance and depended on social assistance to cover the living expenses of themselves and their children. Such was clearly not in accordance with the "classic" conditions imposed by Directive 2004/38 in relation to residence for non-economically active Union citizens. In both cases, the applicants submitted, however, that they did derive a right of residence under Union law from the fact that they were the primary carer of school-going children. The most important factual difference between the two cases was that Ms. Ibrahim was a third country national, whereas Ms Texeira was a Union citizen who had previously been employed in the UK. Furthermore, Teixeira's daughter was over 18 years old, whereas Ibrahim's children were young minors. This element distinguishes *Teixeira* from all other cases discussed under this title.

The ECJ essentially confirmed its holding in *Baumbast and R* and held that the primary carer of school-going children was entitled to reside in the host Member States for the period of his or her children's education. It clearly confirmed that school-going children of a (former) migrant worker derive an independent right of residence from Article 12 of regulation 1612/68.[199] It explained that, precisely in order to guarantee the effectiveness of this independent right of residence, residence rights must be extended to the primary carer of these children, without whom the latter cannot realistically exercise this right. The Court was prepared to go far in its protection of the *effet utile* of the residence rights of school-going children and their primary carer by holding, first, that these residence rights were not subject to the conditions of self-sufficiency and the possession of comprehensive sickness insurance coverage. The Court held, moreover, that these residence rights cannot be made subject to a condition of age. Accordingly, the primary carer of a school-going child is entitled to residence in the host Member State even after that child reaches the age of majority for as long as he child continues to need his presence and care in order to be able to pursue and complete his or her education.

However, it must immediately be pointed out that the Court went at great lengths to base the said rights of residence entirely on Article 12 of Regulation 1612/68 and not on the provisions of Directive 2004/38. It pointed out in this connection that Directive 2004/38 did not abolished article 12 of the Regulation (unlike articles 10 and 11 of the Regulation) and firmly asserted that the entry into force of Directive 2004/38 cannot be interpreted as in any way impacting on the rights derived from article 12 of the Regulation. This begs the obvious question to what extent the Court's reasoning also holds in cases where Article 12 of Regulation 1612/68 is not applicable, notably with regard to children of non-economically active citizens and their primary carer(s). This will be discussed below (see IV.B.2.a., *infra*).

---

198 It follows from the *Housing Act 1996* and the *Allocation of Housing and Homelessness (Eligibility) Regulations 2006* that a person is not eligible for housing assistance unless he has a right of residence in the United Kingdom conferred by EU law (ECJ, Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 14).

199 Accordingly, the Court held that that right is not lost where the parents of the children concerned have meanwhile divorced, and that the fact that only one parent is a Union citizen, and the fact that that parent has ceased to be a migrant worker in the host Member State are irrelevant in this regard (*Ibrahim,* para. 29 and *Teixeira*, para. 37, referring to *Baumbast and R*, para. 63).

d) Carpenter

A last case in which the Court, arguably, accepted that the *effet utile* of the free movement provisions would be compromised if the primary carer of a child were refused the right to reside in the host Member State is *Carpenter*.[200] This case is different from the previous ones in that the Court did not explicitly use the term "primary carer". However, as I will explain, in my view, it embraced the concept implicitly.[201] Mary Carpenter, a third country national, was married to a UK national. She had lived in the UK for some years with her husband and his children from a previous marriage when the Secretary of State made a deportation order against her. Mrs. Carpenter appealed against that decision, arguing that she was entitled to reside in the UK under Union law, namely as the spouse (a privileged family member) of a Member State national. Again, the difficulty with her case lay in the fact that, *prima facie*, she did not fall within the scope of the free movement provisions, *in casu* the provisions on the freedom to provide services as laid down in Article 49 TEC (now Article 56 TFEU) and Council Directive 73/148 (now replaced by Directive 2004/38). Article 1(1) of Directive 73/148 granted a right of residence to *inter alia* the spouse of a Member State national who provides services in another Member State. The problem was that Mrs Carpenter invoked the right to reside with a UK national in the UK, rather than in "another Member State" in which the latter provided services. A first issue to decide for the ECJ was whether Mrs. Carpenter's case was not simply a purely internal one. The ECJ rather swiftly decided it was not, since a consistent proportion of Mr. Carpenter's business consisted of providing services, for remuneration, to advertisers established in other Member States.[202] Accordingly, Mrs. Carpenter was entitled to invoke the provisions on the free movement of services.

Next, the ECJ held that she could not invoke Article 1(1) of Directive 73/148 as she was not joining her husband in another Member State.[203] However, the Court went on to consider whether a right of residence in favour of the spouse could be inferred from "the principles or other rules of [Union] law".[204] Its reasoning again came down to an "*effet utile* reasoning" as described above. First, the Court observed that the absence of a right of residence for Mrs. Carpenter restricted the exercise of Mr. Carpenter's free movement rights. The Court held that:

> "It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse (see, to that effect, *Singh*, cited above, paragraph 23)."

---

200 ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, with case notes by Acierno in (2003) *E.L. Rev.*, 398-407; Jadoul and Vanneste in (2003) *Colum. J. Eur. L.*, 447-455; Luby in (2003) *Journal du droit international*, 593-596; Toner in (2003) *Eur. J. Migration & L.*, 163-172; Van Ooik and Staples in (2002) *N.T.E.R.*, 269-276.

201 This view was also put forward by Currie, "EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law" (2009) *Journal of Social Security Law*, 91; Reich and Harbacevica, "Citizenship and Family on trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons" (2003) 40 *CML Rev.*, 633.

202 ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, paras 28-30.

203 ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, paras 31-35.

204 ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, para. 36.

Second, the Court noted that a Member State may justify restrictive measures by invoking reasons of public interest. The Court concluded that the restrictions *in casu* disproportionately interfered with Mr. Carpenter's free movement rights. It essentially came to this conclusion by considering Article 8 ECHR, something I will concentrate on below.

For now, I will concentrate on the *effet utile* argument and explain how, in my view, the Court already in *Carpenter* extended residence right to the primary carer of children, in a way similar to the other cases discussed above. Admittedly, that this was the case is not immediately clear. Indeed, *prima facie*, *Carpenter* seems not concerned with the *effet utile* of the free movement rights of children, but rather that of spouses, a wholly different category of privileged family members. The Court referred to the need to preserve the free movement rights[205] of Mr. Carpenter rather than those of the children. However, the Court did not explain exactly how a refusal to let Mrs Carpenter reside in the UK would deter the exercise by Mr. Carpenter of the right to provide services in other Member States.

The Court's reference to the *Singh*[206] case is, in my view, not helpful in this regard. In that case Mr. Singh, a third country national, had married a British national and had travelled with her to Germany where they had both worked for some time before returning to the UK. The ECJ firmly established that Mr. Singh derived a right of residence in the UK because otherwise his spouse would be deterred from exercising her right to leave her Member State and exercise an economic activity. The reason is obvious: a Member State national will be less keen on working in another Member State if he or she is not sure that he or she can later return to his or her home Member State and live there together with his or her spouse and children.[207] As the Court stated in paragraph 20 of the *Singh* judgment:

> "[A national of a Member State] would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by [Union] law in the territory of another Member State."

However, in my view, that reasoning cannot apply in *Carpenter.* The reason is that Mr Carpenter never lived in another Member State with his wife and children. In fact, it would seem from the facts given in the case that he had never lived in another Member State himself. It is hard to see then how he would be deterred from providing services to nationals in another Member State by the fact that the conditions surrounding residence for him and his family are more advantageous in that Member State, in which he has never lived, than in his home Member State. I am not arguing here that for the *Singh* reasoning to apply, the spouse must actually have lived in another Member State in which conditions were more beneficial as regards rights for family members. Such reasoning can no longer be maintained after the *Metock and*

---

205 More precisely, his freedom to provide services.

206 ECJ, Case C-370/90 *Singh* [1992] E.C.R. I-4265.

207 Tryfonidou, however, has rejected this interpretation of the decision. She submits that the obstacle to the right to free movement rather lies in the fact that a Member State national having worked in another Member State would be less keen on returning to his home Member State (Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15 *E.L.J.*, 639-640). For reasons explained in detail in Chapter 4, *supra*, I do not agree with this criticism.

Others case,[208] in which the Court firmly rejected that argument.[209] As I have explained in detail in Chapter 4,[210] the conditions relating to family reunification must be such that a Union citizen may not be "punished" for exercising his fundamental freedoms in Member State B rather than in Member State C. Consequently, the conditions relating to family reunification – more precisely the conditions surrounding the possibility for this Union citizen to reside with his or her close family members – may not be less advantageous in Member State B than in Member State C. Such reasoning obviously comes into play once the Union citizen in question decides to move to another Member State and resides there with his non-EU family members. In the absence thereof, the conditions surrounding family reunification in other Member States are completely irrelevant to his situation and cannot deter him in any way. For this reason, I consider that the "obstacles approach" used in *Singh* and *Metock and Others* is not relevant to the *Carpenter* case. As I will explain below, the obstacle in the *Carpenter* case has to be sought elsewhere.

One could rebut my argumentation by stating that one should take into account the conditions relating to family reunification not only in other Member States, but also those in the home Member State and compare them. Accordingly, one could argue that Mr. Carpenter, on the facts of the case, was punished for his decision to settle in the UK, his home Member State, rather than in another Member State with possibly more advantageous conditions regarding family reunification. That argument has to be rejected, for it is not logically consistent with an "obstacle to free movement" approach. If, indeed, more advantageous conditions were in place in another Member State, it is hard to see how a refusal by the UK to grant Mrs. Carpenter leave to remain could have deterred him from exercising his right to move to another Member State and reside there. Rather the opposite is true: he would be encouraged to move to another Member State with more flexible immigration rules, under which his spouse would possibly be entitled to reside with him. Only on his eventual return to the UK, the *Singh* principle would come into action.[211]

How then should the ECJ reasoning in *Carpenter* be understood, if it cannot be understood by merely looking at the situation of Mr. Carpenter and his third-country spouse? In my view, it is necessary to take the situation of Mr. Carpenter's children into account. It is common sense that if Mrs. Carpenter would not be entitled to reside in the UK, she could not look after Mr. Carpenter's children. Consequently, it

---

208 ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241.

209 See on this issue Cambien, "Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform" (2009) 15 *Colum. J. Eur. L.* 334.

210 See Chapter 4, under II.B.2., *supra*.

211 For these reasons, I do not entirely agree with the views of AG Stix-Hackl on the relevance of the *Singh* case to the facts of *Carpenter* (Opinion of AG Stix-Hackl in Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, paras 67-70). Unlike the AG, I consider the fact that Mr. and Mrs. Singh settled in another Member State to be a legally relevant and distinguishing feature of the case. In my understanding, the term "returns" in paragraph 23 of the *Singh* judgment must be understood as "returning after having been settled in another Member State", as was the case in *Singh.* Be that as it may, I do agree with the AG that the ECJ's reasoning in *Singh*, holding that the exercise of fundamental freedoms brought the situation within the scope of Union law, also applies in *Carpenter*. As the AG notes, the fact that Mr Carpenter exercised a different fundamental freedom, namely the freedom to provide services (and not the free movement of workers as in *Singh*), does not in itself make any essential difference as regards the presence of a Union dimension (Opinion of AG Stix-Hackl in Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, 2 para. 65).

would become more difficult for Mr. Carpenter to go to other Member States to provide services because he would need someone to look after his children.[212] This was essentially Mrs. Carpenter's argument before the Immigration Adjudicator[213] and it is submitted that the ECJ in fact accepted these arguments. This is how the ECJ's reference to the need to ensure family life in order to protect the full effectiveness of the provisions on the freedom to provide services needs to be understood. In conclusion, the ECJ used the *effet utile* argument to extend the benefit of the right to reside to Mrs. Carpenter because she took care of children also enjoying this benefit. This is the "primary carer" concept in its embryonic form. The Court did not explicitly stress the importance of the element of "care" for Mrs. Carpenter's entitlement to residence. However, an implicit reference to this element and an indication that it was covered by the Court's references to family life can be found in the last sentence of paragraph 44:

> "Although, in the main proceedings, Mr Carpenter's spouse has infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct, since her arrival in the United Kingdom in September 1994, has not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety. Moreover, it is clear that Mr and Mrs Carpenter's marriage, which was celebrated in the United Kingdom in 1996, is genuine and that Mrs Carpenter continues to lead a true family life there, *in particular by looking after her husband's children from a previous marriage.*" (emphasis added)

e) Conclusion

It is clear from the cases just discussed that the ECJ has used an *effet utile* reasoning to justify extending a right of residence to the primary carer of children entitled to reside in the host Member State, thereby leaving unapplied certain restrictive conditions found in secondary Union law on the free movement of persons. However, it would be wrong to conclude from this that Member States are no longer entitled to apply these restrictive conditions with regard to ascendants of Union citizens. One should not overlook the specific circumstances of the cases just discussed. It may well be that they are rather exceptional in nature, which would explain why residence rights for the primary carer were recognised in so few cases so far. That will be discussed below, when I will consider the scope of this case law. First, I will consider another element clearly present in the Court's reasoning in some of the cases discussed, namely Article 8 ECHR.

2. Right to respect for family life (Article 8 ECHR)

212 See, in this sense, Toner, "Comments on Mary Carpenter v. Secretary of State, 11 July 2002 (Case C-60/00)" (2003) 5 *Eur. J. Migration & L.*, 163, who argues at p. 169: "It is unclear whether the practical assistance with childcare was central to the Court's decision, but its conclusion that the deportation of Mrs Carpenter would be an obstacle becomes more convincing if the childcare (and consequent ability of Mr Carpenter to devote more time to his business) is made central to the reasoning."

213 See ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, paras 17 and 18.

As was already briefly noted in passing, in two of the cases discussed above (*Baumbast and R* and *Carpenter*) the ECJ invoked Article 8 ECHR[214] to justify its holding that a third country national was entitled to reside in the Member State in which the children he or she was caring for were residing. Article 8 ECHR also figures in the Court's judgments in *Ibrahim* and *Teixeira*, in which the Court explicitly referred to the paragraph of *Baumbast and R* containing a reference to that article.[215]

Article 8 ECHR was not explicitly considered by the Court in *Zhu and Chen*, although it was mentioned in the questions referred to it for a preliminary ruling.[216] This can probably be explained by the fact that there was no need to do so as the case for granting a right of residence to Mrs. Chen was already very convincing on grounds of the *effet utile* theory.[217] Indeed, it is clear that baby Catherine would not have been able to live in the UK without her mother. By contrast, in the *Baumbast and R, Carpenter* and *Teixeira* cases, the residence right of only one of the parents was disputed, so it could have been envisaged that the children could stay with their other parent.[218] Hence, there was a stronger need for the ECJ to consider arguments based on Article 8 ECHR. In my view these arguments should – even with regard to the *Zhu and Chen* case – be seen as an additional element that may help to justify and to better understand the outcome of the cases discussed, as will become clear from the discussion below.

Article 8 ECHR is without any doubt among the fundamental rights which, according to settled case law, are recognised by the Union.[219] The Article was explicitly relied upon by the ECJ in *Baumbast and R* as an additional argument in favour of granting residence rights to the primary carer of a child residing in the host Member State.[220] The Court observed that Union legislation on the free movement of persons has to be interpreted in accordance with Article 8 ECHR, without, however, further explicating the requirements deriving from that Article. The absence of a more elaborated

---

214 Article 8 ECHR (Right to respect for private and family lifehttp://conventions.coe.int/treaty/en/Treaties/Html/005.htm - FN1) states:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

215 *Ibrahim*, para. 31 and *Teixeira,* para. 39 (referring to *Baumbast and R*, para. 72).

216 See ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 15 and 16. Unlike the Court, AG Tizzano explicitly referred to Article 8 ECHR. He noted that granting a right of residence to the primary carer would be in conformity with Article 8 ECHR (Opinion of AG Tizzano in Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 94 and 130).

217 Vanvoorden, "Case Zhu and Chen v. Secretary of State for the Home Department" (2005) 4 *Colum. J. Eur. L.,* 305-321, 320.

218 Admittedly, in the case of *Ibrahim*, we lack information about the legal position of Yusuf, Ibrahim's husband, in the UK. It would seem to be the case that he did not have a right to legally reside in the UK (see ECJ, Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 17) and, hence, that the children could perhaps not reside with him in the UK.

219 ECJ, Case 249/86 *Commission v Germany* [1989] E.C.R. 1263, para. 10.

220 ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 72.

argument can, perhaps, be explained by referring to AG Geelhoed's Opinion. The AG noted in this regard[221]:

> "Finally, recognition of a right to remain in favour of the parent carer is also of importance in connection with the ECHR and, in particular, Article 8 thereof which guarantees the right to respect for family life. In that regard I would point to the view expressed by the appellants that refusal to grant leave to remain to a mother of small children constitutes a disproportionate interference with family life and is thus incompatible with the ECHR. I am of the view that the Court does not need to express a view on whether refusal to grant leave to remain to the parent carer might constitute a disproportionate interference; I merely find that a decision to grant such leave does justice to Article 8 of the ECHR."

The bottom-line is that granting a right to the primary carer is in any event in accordance with Article 8 ECHR. The *Baumbast and R* judgment does not, however, provide any insight into the precise requirements flowing from the duty to interpret free movement law in accordance with Article 8 ECHR.

A more developed Article 8 ECHR centred argument is found in the *Carpenter* case. In that case the Court not merely referred to the duty to interpret the provisions on the free movement of persons in accordance with Article 8 ECHR. It moreover considered in some detail whether the restrictive conditions imposed by the UK (the decision not to grant a right of residence to Mrs. Carpenter) could pass scrutiny under Article 8 ECHR. As such, *Carpenter* was the first in a line of highly significant cases in which the Court struck down restrictive conditions surrounding the exercise of the right to freedom of movement because they violated Article 8 ECHR.[222] In these cases the Court consistently underscored the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaties.

In *Carpenter*, the Court first noted that the decision to deport Mrs. Carpenter constituted an interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 ECHR. Such interference, it continued, would infringe Article 8(2) ECHR unless it were "in accordance with the law", "motivated by one or more of the legitimate aims under that paragraph" and "necessary in a democratic society", that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.[223] The Court considered that the decision to deport Mrs. Carpenter did not strike a fair balance between, on the one hand, the right of Mr. Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety. It pointed out, in this regard, that, although Mrs. Carpenter had infringed the immigration laws of the United Kingdom, her conduct since her arrival in the United Kingdom had not

---

221 Opinion of AG Geelhoed in Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 93.

222 ECJ, Case C-459/99 *MRAX* [2002] E.C.R. I-6591, para. 53; ECJ, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] E.C.R. I-5257, paras 97-98; ECJ, Case C-157/03 *Commission* v *Spain* [2005] E.C.R. I-2911, para. 26; ECJ, Case C-503/03 *Commission* v *Spain* [2006] E.C.R. I-1097, para. 41; ECJ, Case C-441/02 *Commission* v *Germany* [2006] E.C.R. I-3449, para. 109; ECJ, Case C-291/05 *Eind* [2007] E.C.R. I-10719, para. 44; ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 56. Admittedly, these cases do not deal with residence rights of "primary carers", but rather with the residence rights of the third country spouse of a Union citizen.

223 ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, paras 41-42.

been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety and that it was clear, moreover, that Mrs. Carpenter continued to lead a true family life in the UK, in particular by looking after her husband's children from a previous marriage.[224] The ECJ concluded that, in the circumstances of the case, the decision to deport Mrs. Carpenter constituted an infringement of Article 8 ECHR which was not proportionate to the objective pursued.[225]

Wile I agree with the ECJ's finding, I believe its reasoning on this point could have been clearer. The Court mentioned the three conditions of Article 8(2) ECHR in passing, but did not consider them separately. With regard to the first condition - accordance with the law - such would *prima facie* have been unnecessary: the deportation measure was clearly in accordance with the UK immigration rules. It must be noted, however, that in some recent cases the ECtHR, when assessing the first condition, has taken into account not only the national law of the State but also, with regard to EU Member States, Union law on the free movement of persons.[226] Applying this case law, Article 8(2) ECHR would have required the deportation measure in *Carpenter* to be in accordance not only with UK rules but also with Union legislation on the free movement of persons, in particular Directive 73/148. Arguably, the deportation measure would have satisfied this test as it was, arguably again, in accordance with the wording of the said regulation and the way it had been interpreted by the Courts.

The second condition - the pursuit of a legitimate aim - was, again, not explicitly considered by the ECJ. The Court accepted without further explanation that the deportation measure pursued the maintenance of public order and public safety. This is correct in my view, but it would have strengthened the legitimacy of the Court had it explained its reasoning on this point, as it is, together with the third condition, vital in determining the scope left to the Member States under Article 8(2) ECHR. In my view the aim pursued by the deportation measure in *Carpenter* was the aim of ensuring the consistent application of the national procedures and rules on immigration.[227] That certainly is a legitimate aim under Article 8(2) ECHR, as is clear from the case law of the ECtHR. The ECtHR has repeatedly confirmed the legitimate objective of the Contracting parties to control "as a matter of well-established international law…the entry, residence and expulsion of aliens".[228] It is

---

224 ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, paras 43-44.

225 ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, para. 45.

226 See, most prominently, ECtHR, Judgment of 17 January 2006 in Case No. 51431/99 *Aristimuño Mendizabal v France*, in which the ECtHR concluded that the denial of a *carte de séjour* to the applicant was in violation of both French law and Union law and that the restrictive measure, therefore, was not adopted "in accordance with the law" (see paras 73-79). The ECtHR explicitly held that "La Cour estime donc que l'article 8 doit être interprété en l'espèce à la lumière du droit communautaire et en particulier des obligations imposées aux Etats membres quant aux droits d'entrée et de séjour des ressortissants communautaires […]" (para. 69 of the judgment).

227 As was submitted by the UK in its observations to the Court (see Opinion of AG Stix-Hackl in Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, para. 18).

228 See, *inter alia*, ECtHR, Judgment of 18 February 1991 in Case No. 12313/86 *Moustaquim v Belgium*, para. 43; ECtHR, Judgment of 19 February 1996 in Case No. 23218/94 *Gül v Switzerland*. See further ECtHR, Judgment of 21 June 1988 in Case No. 10730/84 *Berrehab v. the Netherlands,* para. 26. See also the discussion in Forder, "Family Rights and Immigration Law: a European Perspective", in H. Schneider (ed.), *Migration, Integration and Citizenship. A*

important to emphasize this legitimate objective and to point out that Article 8 ECHR does not take away the sovereign power to pursue immigration policies. It is only normal then that the ECtHR has consistently held that States enjoy a certain margin of appreciation in this field.[229] However, this margin is not unlimited and it seems, moreover, that ECtHR has over the years steadily reduced this margin.[230] Moreover, in the EU, this margin is further reduced still by secondary Union legislation, which surrounds for example the possibility for the Member States to invoke public policy exceptions with restrictive conditions which are subject to ECJ control.[231] The bottom-line is probably that the ECJ should recognise a certain margin of appreciation on the part of the Member States when assessing alleged violations of Article 8 ECHR, although this margin should be interpreted rather narrowly. That element of appreciation is consistently dealt with under the third condition, that of being necessary in a democratic society, to which I will turn now.

The third condition - being necessary in a democratic society - is probably the most important one, as its application requires a delicate balancing act between the interests of the State and the interest of the individual. In *Carpenter*, the ECJ based its finding that the third condition was not fulfilled on mainly two points: 1) that there was no sign that Mrs. Carpenter constituted a danger to the public order or safety of the host Member State, and 2) that she led a genuine family life, in particular by looking after her husband's children from a previous marriage.

The first point is reminiscent of the *Boultif* case,[232] to which the Court referred in paragraph 42. That case has become a model for cases in which the ECtHR has to pronounce on deportation measures which have been taken after the applicant was criminally convicted.[233] In these cases, the ECtHR balances the applicant's right to respect for family life against the State's legitimate aim of "preventing disorder or

---

Challenge for Europe's Future (Maastricht, Forum Maastricht, 2005), 71-108; Rogers, "Immigration and the European Convention on Human Rights: are new principles emerging?" (2003) E.H.R.L.R., 53-64; Toner, "Community law immigration rights, unmarried partnerships and the relationship between European Court of Human Rights jurisprudence and Community law in the Court of Justice" (2001) 5 *Web Journal of Current Legal Issues,* http://webjcli.ncl.ac.uk/2001/issue5/toner5.html, at 10 *et seq*.

229 *E.g.* ECtHR, Judgment of 25 March 1983 in Cases No. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 *Silver and Others v. the United Kingdom*, para. 97; ECtHR, Judgment of 26 March 1985 in Case No. 8978/80 *X and Y v. the Netherlands*, para. 23; ECtHR, Judgment of 19 February 1996 in Case No. 23218/94 *Gül v Switzerland*, para. 38. See in this connection: Farahat, "The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants" (2009) 11 *Eur. J. Migration & L.*, 262 *et seq.*; Arai-Takahashi and Crawford, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Antwerp, Intersentia, 2002), 300 p; Ovey, "The Margin of Appreciation and Article 8 of the Convention" (1998) 19 *HRLJ*, 10-12.

230 Mowbray, "The Creativity of the European Court of Human Rights" (2005) *Hum. Rts. L. Rev.*, 72-79.

231 See the discussion in Chapter 4, *supra*. See further Lundström, "Family Life and the Freedom of Movement of Workers in the European Union" (1996) 10 *Int'l J.L. & Pol'y & Fam.*, 274.

232 ECtHR, Judgment of 2 August 2001 in Case No. 54273/00 *Boultif v. Switzerland.*

233 The applicant in *Boultif* had committed the offences of robbery and damage to property by attacking man, by throwing him on the ground, kicking him in the face and taking 1,201 Swiss francs from him (*Boultif*, para. 9). For a more recent example, in which the Court refers to *Boultif*, see ECtHR, Judgment of 18 October 2006 in Case No. 46410/99 *Üner v. the Netherlands* (applicant convicted of *inter alia* violent offence against a person, manslaughter and assault).

crime".[234] It takes into account *inter alia* the nature and seriousness of the offence committed by the applicant and considers the extent to which it could give rise to an assumption that the applicant constitutes a danger to public order and security.[235] However, the facts of the *Carpenter* case were rather different, since Mrs. Carpenter had not committed a violent crime. The only relevant laws she had violated were the UK's immigration rules. The first point considered by the ECJ was, therefore, not relevant or at least not as important as in the cases just mentioned dealing with the expulsion of "criminals".

To underscore the second point, the fact Mrs. Carpenter led a genuine family life, the ECJ emphasized that she "was looking after her husband's children". In my view, this last element, the element of "care", was the central one in the assessment of Article 8(2) and largely motivated the ECJ's conclusion that Article 8 ECHR had been violated. This view is confirmed by the case law of the ECtHR,[236] - which is increasingly followed by the ECJ in its interpretation of the ECHR -, which also attributes much importance to the element of care in the application of Article 8 ECHR.[237] In fact, in *Üner*, the ECtHR listed as one of the elements to take into account under Article 8(2) ECHR "the best interests and well-being of the children".[238]

It could be objected, however, that the Court did not sufficiently consider other factors which are taken into account by the ECtHR when balancing interests under Article 8(2) ECHR. As Toner notes, the two points mentioned by the ECJ in themselves would in the traditional case law of the ECtHR not have been considered sufficient to justify the conclusion that the UK rules were incompatible with Article 8 ECHR.[239] The ECtHR normally considers a number of elements in its assessment,

---

234 *E.g. Boultif*, paras 44-46.

235 *E.g. Boultif*, paras 50-51.

236 See for instance the discussion by Thym, "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Right to Regularize Illegal Stay?" (2008) 57 *Int'l & Comp. L.Q.*, 87-112, 87-112.

237 See in this regard also the *Berrehab* judgment of the ECtHR, which concerned the refusal by the Netherlands of a right of residence to the Moroccan father of a young child called Rebecca. With regard to the third condition, the Court noted that the interference with Article 8 ECHR was disproportionate, stating (at paragraph 29) "As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young". See also the Şen case (ECtHR, Judgment of 21 December 2001 in Case No. 31465/96 *Şen v. the Netherlands*), which demonstrates how the interests of little children are pre-eminently capable of founding a claim to family reunification in the host state (see Opinion of AG Kokott in Case C-540/03 *European Parliament v Council* [2006] E.C.R. I-5769, para. 69).

238 ECtHR, Judgment of 18 October 2006 in Case No. 46410/99 *Üner v. the Netherlands*, para. 58. See also the earlier judgment in the Şen case (ECtHR, Judgment of 21 December 2001 in Case No. 31465/96 *Şen v. the Netherlands*, para. 40).

239 Toner, "Comments on Mary Carpenter v. Secretary of State, 11 July 2002 (Case C-60/00)" (2003) 5 *Eur. J. Migration & L.*, 170.

which were listed in a comprehensive manner for the first time by the ECtHR in the *Boultif* case, in which it stated[240]:

> "In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."

These criteria, known as the *Boultif*-criteria,[241] have become the guiding principles for the ECtHR in later cases.[242] In *Üner*[243] the ECtHR, after listing these criteria, added, or rather explicated, two extra criteria: 1) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and 2) the solidity of social, cultural and family ties with the host country and with the country of destination. In a number of other cases, which deal in the first place with the refusal of a Member State to grant a right of residence rather than with expulsion or deportation measures taken after criminal conviction(s), the ECtHR has phrased the relevant factors to be taken into consideration as follows[244]:

> "[…] Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Mitchell v. the United Kingdom*

---

240 ECtHR, Judgment of 2 August 2001 in Case No. 54273/00 *Boultif v. Switzerland*, para. 48. These criteria (nicknamed the "Boultif criteria") have become established case law of the ECtHR.

241 See, *e.g.* Thym, "Respect for private and family life under article 8 ECHR in immigration cases: a human right to regularize illegal stay?" (2008) 57 *Int'l & Comp. L.Q.,* 93.

242 See, *e.g.,* ECtHR, Judgment of 11 July 2002 in Case No. 56811 *Amrollahi v. Denmark*, para. 41; ECtHR, Decision of 31 May 2005 in Case No. 16387/03, *Davydov v Estonia*.

243 ECtHR, Judgment of 18 October 2006 in Case No. 46410/99, *Üner v the Netherlands*, paras 58. See the discussion in Steinorth, "Üner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life" (2008) *Hum. Rts. L. Rev.*, 185-196.

244 ECtHR, Judgment of 31 January 2006 in Case No. 50435/99 *Rodrigues Da Silva and Hoogkamer v. the Netherlands*, para. 39. See also ECtHR, Judgment of 26 April 2007 in Case No.16351/03 *Konstatinov v. the Netherlands*, para. 48; ECtHR, Judgment of 4 December 2008 in Case No.16351/03 *Y v. Russi*a, para. 104; ECtHR, Judgment of 31 July 2008 in Case No. 265/07 *Omoregie and Others v. Norway*, para. 57.

(dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999)."

In *Carpenter* the ECJ considered only the two elements mentioned above explicitly. Yet it seems defensible to state that other factors could also have been relevant to the case and that striking the appropriate balance under Article 8(2) ECHR would have required them to have been taken into account. Two elements in particular would seem to have been relevant to the case. First, the possibility for the family[245] to live in another country, for instance the country to which the applicant would be expulsed, was not at all considered by the ECJ, while it is central to the ECtHR's reasoning in a vast number of Article 8 ECHR cases.[246] It can be wondered whether this is a default in the ECJ's reasoning and whether, taking that element into account, it would have come to another conclusion on the violation of Article 8 ECHR. In my view, this question needs to be answered in the negative. On the basis of the limited facts stated in the case, it would seem to have been the case that there was no reasonable possibility for the Carpenters to move to the Philippines (the country of origin of Mrs. Carpenter), given the fact that Mr. Carpenter's business (the source of income for the family) was established in the UK and given that he was likely not proficient[247] in the local languages of the Philippines.[248] Besides, it can be argued that the ECJ, in interpreting Union free movement legislation in accordance with Article 8 ECHR, should not give too much weight to the possibility to live in another country.[249] The reason is that Union citizens have, under certain conditions, the right to establish themselves in the Member State of their choice and to be joined there by their (third-country) family Members. For the ECJ, to inquire into the possibility to live in another Member State would be tantamount to a straightforward denial of this right.

---

245 This includes minor children: see the first of the two additional criteria put forward by the Court in para. 58 of *Üner*.

246 See, *e.g.*, ECtHR, Judgment of 31 July 2008 in Case No. 265/07 *Omoregie and Others v. Norway*, para. 66; ECtHR, Judgment of 18 October 2006 in Case No. 46410/99 *Üner v. the Netherlands*, in which the ECtHR indicates that this possibility is greater in the case of younger children, who are still of an "adaptable age".

247 Knowledge of the language of a third country is considered a relevant element by the ECtHR to asses the possibility for the family to live in that country. In *Omoregie and Others*, it considered that there was a realistic possibility to develop a family life in Nigeria (the applicant's country of origin), *inter alia* since his Norwegian spouse spent a period in another African country, South Africa and since English was also the official language of Nigeria. By contrast, in *Boultif*, the ECtHR considered that the fact that the Swiss spouse of an Algerian national did not speak Arabic made it impossible for her to establish her family in Algeria, even despite the fact that she spoke French, the second national language of Algeria. On the differences between these two decisions, see de Hart, "Love Thy Neighbour: Family Reunification and the Rights of Insiders" (2009) 11 *Eur. J. Migration & L.*, 248-249. For a case in which the alleged absence of knowledge of the language of a third country was not considered a decisive factor by the ECtHR, see ECtHR, Judgment of 26 April 2007 in Case No.16351/03 *Konstatinov v. the Netherlands.*

248 The same can *a fortiori* be said about the *Zhu and Chen* case: baby Catherine was as the second child of Chinese nationals not entitled under Chinese law to reside in China, except for periodic short-duration stays. The Court did not explicitly consider Article 8 ECHR, but had it done so it could (explicitly or implicitly) have concluded that the condition of impossibility to establish family life elsewhere was fulfilled (see Hofstotter, "A Cascade of Rights, or Who Shall Care For Little Catherine? Some Reflections on the Chen Case" (2005) 30 *E.L. Rev.*, 555).

249 It must be noted that even the ECtHR does not always take this element to account. It limits its assessment to the first three *Boultif* criteria when a foreigner was born in the host country or moved there in his young childhood (see ECtHR, judgment of 10 July 2003 in Case No. 53441/99 *Benhebba v. France*, para. 33).

This point of view finds some support in recent cases like *Metock and Others*[250] and *Ruiz Zambrano.*[251]

Second, the ECJ in *Carpenter* did not at all take into account that the family was formed at a moment when the immigration status of Mrs. Carpenter was precarious.[252] The ECtHR has consistently held that in such circumstances the removal of the non-national family member constitutes a violation of Article 8 ECHR only in the most exceptional circumstances, as there can have been no reasonable expectation that family life can be continued in the host country. In my view, the *Carpenter* case presented precisely such an exceptional situation because Mrs. Carpenter was the primary carer of minor children. I find support for this argument in the *Hoogkamer*[253] case. In that case a Brazilian woman had overstayed her tourist visa in the Netherlands when she married a Dutch national with whom she conceived a daughter. The ECtHR decided that she could not be expulsed, despite the fact that her stay had been illegal throughout, that she was well aware of it and had not made any attempt to regularise it, because of the far-reaching consequences an expulsion would have on her responsibilities as a mother and on her family life with her young daughter.[254] The bottom-line was that the fact that she factually[255] cared for her baby trumped considerations relating to her immigration status. In my view, the facts in *Carpenter* justify a similar conclusion: the fact that Mrs. Carpenter was the primary carer of young children should be considered the decisive factor, which tilted the balance in favour of her interest to reside with her children.[256]

---

250 In the *Metock and Others* judgment the Court rejected a certain interpretation of Directive 2004/38 as incompatible with Union law because "Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country" (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 89). According to Costello, this can be interpreted as an "oblique criticism" of the case law of the ECtHR which allows Member States to refuse a residence application on behalf of a third country family member if the family could establish family life together in the latter's home country (Costello, "Metock: Free movement and 'Normal Family Life' in the Union" (2009) 46 *CML Rev.*, 603-604).

251 In *Ruiz Zambrano* (ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr), the Court considered that (in the specific circumstances of the case) national decisions forcing Union citizens to leave for a third country were in violation of Union law. This reasoning was confirmed in *McCarthy* (ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr.). The Court did not explicitly refer to Article 8 ECHR, but fundamental rights considerations were arguably implicit in the Court's reasoning (see in detail Chapter 4, under III.B.3., *supra*).

252 At the moment of the marriage between Mrs. and Mr. Carpenter, the former was in fact staying illegally in the UK, overstaying her leave to enter the UK as a visitor and having failed to apply for an extension of her stay (ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279, para. 13).

253 ECtHR, Judgment of 31 January 2006 in Case No. 50435/99 *Rodrigues Da Silva and Hoogkamer v. the Netherlands.*

254 *Ibid.*, para. 44: "In view of the far-reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth".

255 The Brazilian mother had lost child custody over her daughter.

256 This may also be a consideration which explains why in *Ruiz Zambrano* (ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr) the Court did not seem to consider relevant the fact that Mr.

In conclusion, it is clear from the judgments just discussed that Article 8 ECHR can be an additional argument to grant a right of residence to the primary carer of children where he or she does not derive such a right from secondary Union law, when strictly applied. The application of Article 8 ECHR will require the balancing of the State's interest in maintaining an effective immigration policy, *inter alia* by deporting undesired or criminal aliens, against the interest of a child to reside with his primary carer. As explained above, the element of care will in most circumstances be the decisive one.

3. Conclusion

The bottom-line is that a refusal to grant a right of residence to the primary carer can a) hinder the exercise of free movement rights (by the children or the spouse of the primary carer) and b) violate the right to respect for family life. Admittedly, to some extent the two justifications are intertwined. Indeed, one could argue that, in the cases discussed, the obstacle to the exercise of the free movement rights consisted precisely in the fact that the right to family life could not duly be exercised.[257] The proper way to put it is that the argument based on Article 8 ECHR complements and reinforces the *effet utile* argument. Article 8 ECHR can require granting a right of residence to the primary carer even where in the absence of such right the child concerned could, strictly speaking, still exercise his free movement rights. That could be the case, for instance, where the parent-primary carer but not the other parent of the child would be refused a right of residence. As I observed higher, this explains why the Court explicitly considered arguments based on Article 8 ECHR in *Baumbast and R*, and at more length still, in *Carpenter*, but not in *Zhu and Chen*. This shows how Article 8 ECHR reinforces the argument that the parent-primary carer should enjoy a right to join his child in the host State.[258]

B. Notion Primary carer

In the foregoing I have explained how the ECJ has extended the benefit of the free movement rights under Union law to the "primary carer" of children enjoying such rights, despite the fact that such was not mandated by secondary Union law on the free movement of persons. I have argued that the ECJ based its holding on two main lines of reasoning: an *effet utile* reasoning, on the one hand, and a fundamental rights based reasoning, on the other hand, and submitted that these lines of reasoning were to some extent intertwined. I discussed these lines of reasoning in the light of a

---

Ruiz Zambrano had violated the Belgian immigration provisions; although it did not in that Case explicitly consider fundamental rights (see further the detailed discussion in Chapter, *supra*).

257 See para. 39 of the *Carpenter* judgment: "It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, *therefore*, to the conditions under which Mr Carpenter exercises a fundamental freedom" (italics added).

258 According to well established case law of the ECtHR, "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life" and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 ECHR (see, *inter alia*, ECtHR, Judgment of 24 February 1995 in Case No. 16424/90 *McMichael v. Switzerland*, para. 86; ECtHR, Judgment of 21 December 2001 in Case No. 31465/96 *Şen v. the Netherlands*, para. 34).

number of recent cases in which the ECJ, arguably, recognised a right of residence for the primary carer of children and came to the conclusion that the Court's reasoning was convincing when applied to the facts of these cases. In my view, the extension of a residence right to the primary carer is justified not only in the specific circumstances of the cases discussed, but should be seen as a broader principle of Union free movement law. I would argue that the facts of these cases are not exceptional[259] and that a similar situation in which the residence right of a third country national being the primary carer of a Union citizen is at stake is not all that uncommon. Accordingly, still in my view, future Union free movement legislation should perhaps add the primary carer to the categories of privileged family members of Union citizens. It would not be the first time that a ruling of the ECJ in which it distances itself from secondary (and even primary) Union law is later taken over by the Union legislator.[260] However, I immediately remark that the concept "primary carer" should be given a clear definition in order for it to be possible to determine its exact scope.

The primary carer concept is not a traditional concept of Union law, and did not appear in Union legislation or Union documents until the *Baumbast and R* judgment. It is perhaps rather unfortunate then that the ECJ merely took over the terminology from the referring court[261] without making an attempt to define it. This has led to considerable uncertainty surrounding this concept. In particular, it is unclear whether only a (non-dependent) parent can derive a right of residence as the primary carer of a Union citizen, or whether the concept should be construed more broadly so as to include other ascendants or even other family members, like siblings, or even non family members like the guardian of a child. The case law of the ECJ provides firm authority only for the first, narrow, view, since in all cases discussed above the primary carer was the parent of the child concerned. That in itself is not such as to close the discussion, since the principles underlying the said cases may well support the second, broader, point of view. Besides, the case law discussed would seem to grant a special status of school-going children of migrant workers and their primary carer since some of the cases discussed were decided under the specific legal basis of Article 12 of Regulation 1612/68.

---

259 Vanvoorden points out that the facts in *Zhu and Chen* really are exceptional in that it was impossible under Chinese legislation for baby Catherine to live in China with the rest of her family. She states in this regard (Vanvoorden, "Case Zhu and Chen v. Secretary of State for the Home Department" (2005) 4 *Colum. J. Eur. L.,* 321): "The fact that it was impossible for Catherine to stay with the rest of her family in China for a period of more than thirty subsequent days most probably influenced the decision of the ECJ; one can only wonder whether the ECJ would have followed the same reasoning if Catherine had been able to join the family in China." While I agree that this is a truly particular aspect of the case, I do not consider it to have influenced the reasoning of the Court or the outcome of the case. Moreover, this aspect was clearly not present in the other cases discussed in which the primary carer was given a right of residence.

260 The most famous example is probably the recognition by the ECJ of the European Parliament's right to bring an action despite the fact that the Treaties (Article 173 TEEC) did not provide for such a right, which was later codified in Article 230 TEC (current Article 263 TFEU): see ECJ, Case C-70/88 *European Parliament v Council* [1990] E.C.R. I-2041. The requirement that an action brought by the European Parliament must seek to safeguard its prerogatives was abolished by the Treaty of Nice.

261 "Primary carer" figured in the second question referred to the ECJ for a preliminary ruling (ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 28). It also figured in the first question referred to the Court in *Zhu and Chen* (ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 15).

In the following, I will try to come to a more precise determination of the notion primary carer and the scope of the residence rights enjoyed by primary carers under Union law. For that purpose, I will look in more detail into the case law of the ECJ and the ECtHR to get a precise understanding of this concept. Given that it is a relatively new concept, at least as far as Union law is concerned, I find it useful to consider first how the term is understood in legal systems in which it is traditionally known.

1. Terminology

As I pointed out higher, the notion "primary carer" is a relatively new notion in Union law.[262] However, it is a relatively well-known notion in a number of (common law) judicial systems around the world. The term "primary carer" is rather commonly used in the UK, as is witnessed, for instance, by a relatively high number of documents of (semi-)public bodies[263] using the term. It is also an important and well defined legal concept in other English-speaking countries like Australia[264] and the United States,[265] to which I will come back later. Not surprisingly, in all cases discussed above in which the ECJ was concerned with the residence rights of the primary carer the referring court was an English court.[266] By contrast, the concept is alien to other, continental European, legal systems.

This explains the difficulty to translate "primary carer" in other languages, as is illustrated by the different language versions of the *Baumbast and R* and *Zhu and Chen* judgments. In French, "primary carer" is translated by "le parent qui a effectivement la garde de ces enfants",[267] "la personne assurant effectivement sa garde",[268] "le parent qui garde effectivement l'enfant",[269] "la personne responsable à titre principal",[270] "le parent […] qui a effectivement la garde d'un enfant"[271] or "le parent assurant effectivement la garde de cet enfant". The multiple and rather descriptive translations clearly demonstrate how difficult it is to find an appropriate translation for the concept "primary carer" in French. Telling in this regard is the fact

---

262 As was noted by Reich and Harbacevica, "Citizenship and Family on trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons" (2003) 40 *CML Rev.*, 632.

263 See, *e.g.*, the document on ticket prices for the National Galleries of Scotland, *available at* http://www.nationalgalleries.org/whatson/page/5:4548/.

264 See, *e.g.*, "A New Tax System (Family Assistance) Act 1999" (FA), which embraces the concept of "primary carer" in Section 26(1)a).

265 In the US, reference is usually made to "primary caregiver" or "primary caretaker" rather than to "primary carer" (see *Black's Law Dictionary* (9th ed.), (St. Paul, Thomson West, 2009)). For a discussion of the concept, see Weyrauch, Katz and Olsen, *Cases and materials on family law: legal concepts and changing human relationships* (Saint Paul, West publishing Co., 1994), 438-444.

266 Additionally, two references for a preliminary ruling are currently pending before the Court in which the Upper Tribunal (United Kingdom) explicitly employs the expression "primary carer" (see references in Cases C-147/11 *Czop* and C-148/11 *Punakova*).

267 See ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, paras 64 and 75; ECJ, Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 25.

268 See ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 73.

269 See ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 73.

270 See ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 13 and 15.

271 See ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 45.

that in the French version of the *Baumbast and R* judgment the English term "primary carer" is inserted between square brackets in the translation of the second question referred to for a preliminary ruling.[272] Interesting to note in this connection is a comment by Leo Mulders, a translator at the ECJ, who states[273]:

> "Major problems arise where reasoning is based on a specific term which may only be valid in one or more language versions, while in other versions a term used is not fully equivalent or sometimes even does not occur. Insofar as translator's footnotes are allowed in Opinions of an Advocate General, the problem can be solved relatively easily[274]. However, such footnotes are not permitted in the Court's judgments. In such cases square brackets may be used to introduce the term required in the rule to be interpreted. Other cases require inventiveness on the part of the translator."

In Dutch the concept is mostly translated by the Court by "de ouder die deze kinderen daadwerkelijk verzorgt", [275] "de ouder die daadwerkelijk voor zijn verzorging instaat" [276] or "de persoon die daadwerkelijk voor hun verzorging instaat", [277] "voornaamste verzorger",[278] "ouder […] die daadwerkelijk zorgt voor een kind"[279] or "ouder die daadwerkelijk de zorg voor dat kind heeft".[280] Like the French version, the Dutch version of the *Baumbast and R* judgment explicitly refers to the English term "primary carer" between square brackets.[281] This clearly illustrates the difficulty of translating "primary carer" into languages in which it did not originally exist. The same exercise I have just carried out with regard to the Dutch and the French version of the judgment in *Baumbast and R* could be done with regard to other language versions, presumably further strengthening this conclusion.[282] That is all the more the case as it can be assumed that many language versions will be translated from the French version of the judgment, which gives a rather descriptive translation of "primary carer" only. The reason for this is that the judgment will have been drafted in French first as French is the working language of the Court,[283] even despite the fact that only the English version is authentic, English being the language of the case.[284]

---

272 Para. 28 of the *Baumbast and R* judgment (French version).

273 Mulders, "Translation at the Court of Justice of the European Communities", in Prechal and van Roermund (eds.), *The Coherence of EU Law The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press, 2008), 54.

274 [Alternatively, an advocate general facing a comparable problem when discussing an argument which does not really pass in his language, may give linguistic information in a footnote, which will not always be translated if the problem does not rise in the target language.]

275 See ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091*,* paras 64 and 75; ECJ, Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 25.

276 See ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091*,* para. 73.

277 See ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091*,* para. 73.

278 See ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, paras 13 and 15.

279 See ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 45.

280 ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, para. 34.

281 Para. 28 of the *Baumbast and R* judgment (Dutch version).

282 See, for instance, on the German translation ("die Personensorge tatsächlich wahrnehmende Person"): Reich and Harbacevica, "Citizenship and Family on trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons" (2003) 40 *CML Rev.*, 626.

283 Mullen, "Do You Hear What I Hear? Translation, Expansion, and Crisis in the European Court of Justice", in M. Green Cowles and M. Smith (eds), *The State of the European Union: Risks, Reform, Resistance, and Revival* (Oxford, Oxford University Press, 2000), 246-265; Edward, "How the Court of Justice Works" (1995) 6 *E.L. Rev.,* 539; Mancini and Keeling, "Language, culture and politics in the life of the European Court of Justice" (1995) *Colum. J. Eur. L.,* 397-399. In theory all language versions should be translated direct from the authentic versions; in

The translations quoted above indicate that the essence of the notion primary carer is most probably that the person it refers to "effectively cares for the child" or "is the person who mainly takes care of the child". This is confirmed when we look at the definition of the concept in other legal systems in which it has existed traditionally. For instance, the "Family Assistance guide" of the Australian government explains that, for the purposes of Family Assistance Act, the primary carer is the "member of a couple identified as having greater responsibility for the children". It is further specified that the primary carer is the person who generally "has major daily responsibility for caring for the children in the family", "looks after the children's needs", "makes most arrangements for the daily needs of the children", "makes appointments for the children" and "is the first person for the day care, school, or college to contact in emergencies, or is the partner who is responsible for taking the children to and from day care/pre-school/ kindergarten/school."

Black's Law Dictionary[285] gives the following definition of "primary caregiver"[286] (under US law):

> "1. The parent who has had the greatest responsibility for the daily care and rearing of a child. 2. The person (including a nonparent) who has had the greatest responsibility for the daily care and rearing of a child. — Also termed primary caretaker."

Weyrauch, Katz and Olsen give a more elaborate definition of the concept[287]:

> "The 'primary caretaker' is the parent who has taken primary responsibility for, *inter alia*, the performance of the following care and nurturing duties as a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, *i.e.* transporting to friends' houses, or, for example, to girl or boy scout meetings; (6) arranging alternative care, *i.e.*, baby-sitting, day-care etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, *i.e.* teaching general manners and toilet training; (9) educating, *i.e.* religious, cultural, social etc.; and, (10) teaching elementary skills, *i.e.* reading, writing and arithmetic."

These definitions confirm my basic assumption that the "primary carer" is the person who is principally responsible for the care of a child. However, the definitions do not provide an unequivocal answer to the question asked above, namely whether only parents can qualify as "primary carer" or whether the notion should be construed

---

practice, however, it appears that many language versions are translated form the original French version of the judgment. This practice of "indirect" or "pivotal" translations has further been institutionalised after the May 2004 enlargement; for a detailed discussion, see McAuliffe, "Enlargement at the European Court of Justice: Law, Language and Translation" (2008) 14 *E.L.J.*, 806-818; McAuliffe, "Translation at the Court of Justice of the European Communities", in D. Stein, F. Olsen and A. Lorz (eds) *Translation Issues in Language and Law* (Basingstoke, Palgrave Macmillan, 2009), 99-115.

284 CFI (Order of 5 February 2001), Case T-344/00 *Goldstein v Court of Justice*, not reported, para. 6 (cited in Lenaerts, Arts and Maselis, *Procedural law of the European Union* (2nd ed.), (London, Sweet & Maxwell, 2006), 579).

285 *Black's Law Dictionary* 9th ed., (St. Paul, Thomson West, 2009).

286 In my view the terms "primary carer", "primary caregiver" and "primary caretaker" should be considered synonyms in this context (see n. 265, *supra*).

287 Weyrauch, Katz and Olsen *Cases and Materials on Family Law: Legal Concepts and Changing Human Relationships* (Saint Paul, West publishing Co., 1994), 439.

more broadly, as some scholars have suggested.[288] The different language versions of the judgments cited above contain some elements that may indicate a broader conception of that notion in the EU context. I will now turn to those cases in more detail in order to determine more precisely the meaning and scope of the notion.

2. Case law analysis

In the following, I will try to determine with more precision the meaning and scope of the notion primary carer and of the residence rights enjoyed by primary carers under Union law. For that purpose I will base myself on the reasoning followed by the Court in the cases discussed above and the principles underlying these cases. However, I will first concentrate on the children involved in the cases discussed. The reason is that some of the cases involved school-going children of migrant workers and were decided on the specific legal basis of Article 12 of Regulation 1612/68. This was even the case after the entry into force of Directive 2004/38,[289] which now comprehensively lays down the rules on the freedom of movement for Union citizens and their family members. The question that arises therefore is whether the rights enjoyed by the primary carer of children are different depending on whether they are based on Regulation 1612/68, on the one hand, or on Directive 2004/38, on the other hand. This will be considered first.

a) Regulation 1612/68 vs Directive 2004/38

As I explained higher, Directive 2004/38 comprehensively codified the provisions on the free movement of persons previously laid down in different legal instruments dealing with the free movement rights of specific categories of persons. Until *Ibrahim* and *Teixeira*, the cases in which the Court recognised the free movement rights of primary carers had been decided on the basis of the previously existing legal instruments. The question that arose in *Ibrahim* and *Teixeira* was whether these older cases, the *Baumbast and R* case in particular, were still good law, in view of the fact that Directive 2004/38, which codified part of the Court's case law,[290] did not extend the categories of privileged family members of Union citizens so as to include their primary carer, even under restrictive conditions. It could have been assumed, therefore, that the Union legislator had implicitly overturned the said cases and that the outcome achieved in *Baumbast and R* – decided under Articles 10-12 of Regulation 1612/68 – would have been different had the case been decided under the

---

288 Starup and Elsmore, "Taking a Logical Step Forward? Comment on Ibrahim and Teixeira" (2010) 35 *E.L. Rev.*, 583-584; Vanvoorden, "Case Zhu and Chen v. Secretary of State for the Home Department" (2005) 11 *Colum. J. Eur. L.*, 319.

289 As is clear from cases *Ibrahim* and *Teixeira.*

290 This appears, for instance, from some of the recitals in the preamble to the Directive (see *inter alia* recitals 9 and 27). Another illustration of this phenomenon is given by Currie, who remarks that the new definition of family members in Directive 2004/38 codifies ECJ, Case 59/85, *Netherlands v Reed* [1986] E.C.R. 1283 and that the extension of equal treatment rights to lawfully resident migrant citizens in Article 24 of Directive 2004/38 art.24 codifies a line of case law which started with ECJ, Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] E.C.R. I-2691 (Currie, "EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law" (2009) *Journal of Social Security Law*, 81, footnote 16).

new provisions of Directive 2004/38. This was, in fact, argued in *Ibrahim* and *Teixeira* by some of the parties before the Court, who submitted that the entry into force of Directive 2004/38 had for a consequence that a right of residence could no longer be derived from the provisions of Regulation 1612/68, at least not considered separately from the conditions of Directive 2004/38.[291]

The Court firmly rejected this argument and held that *Baumbast and R* was still good law. It based this view on essentially four arguments. First, it pointed out that Directive 2004/38 did not repeal Article 12 of Regulation 1612/68 unlike Articles 10 and 11 of that Regulation. Second, the Court observed that the *travaux préparatoires* to Directive 2004/38 show that it was designed to be consistent with the judgment in *Baumbast and R.*[292] Third, the Court observed that if Article 12 of Regulation 1612/68 could no longer be interpreted as conferring a right of residence on school-going children and their primary carer but only as conferring the right to equal treatment with regard to access to education, it would have become superfluous with the entry into force of Directive 2004/38, which lays down in its Article 24(1) a general right to equal treatment, that is applicable to access to education. Lastly, the Court noted that, according to recital 3 in the preamble to Directive 2004/38, the aim of that Directive is *inter alia* to simplify and strengthen the right of free movement and residence of all Union citizens and that, hence, Directive 2004/38 could not be interpreted as limiting the residence rights previously recognised on the basis of the provisions of Regulation 1612/68.

Accordingly, the Court made it clear that the entry into force of Directive 2004/38 did not invalidate its earlier case law on the residence rights of primary carers, even though it was not codified by that Directive. The Court's refusal to interpret the provisions of Directive 2004/38 as meaning a "step back" as regards residence rights for school-going children and their primary carer can certainly be met with approval. More dubious is the Court's insistence in *Ibrahim* and *Teixeira* to base its findings relating to these residence rights exclusively on Article 12 of Regulation 1612/68 and not to any extent on the provisions of Directive 2004/38. Admittedly, on the facts of these cases, the Court was concerned with the residence rights of school-going children of (former) migrant workers. Still, it is striking that the Court carefully avoided drawing any conclusions or making any statements regarding the rights of school-going children of non-economically active Union citizens and their primary carer. This leaves one wondering whether school-going children of (former) migrant workers form a special category as far as the residence rights enjoyed by them and by their primary carer are concerned. This will be considered in more detail in the following.

i) School-going children vs non school-going children

---

291 See ECJ, Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 44; ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, paras 31-32.

292 The Court referred to the Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2003) 199 final, 7. The Court seems to be increasingly referring to the preparatory works of legislative instruments (for another recent example of a case dealing with Directive 2004/38, see ECJ, Case C-162/09 *Lassal* [2010] E.C.R. nyr., para. 55).

The Court made it very clear in *Baumbast*, *Ibrahim* and *Teixeira* that school-going children of a migrant worker enjoy an independent right of residence in the host Member State, which is not lost, for instance, when their parent-migrant worker loses his or her status of migrant worker or leaves the host Member State. It is clear from this case law that this independent right is enjoyed by children of a migrant worker enrolled in all types of education, including higher education and university education. Accordingly, school-going children continue to enjoy a right of residence when they attain the age of majority[293] and for as long as their schooling lasts. Besides, as explained above, the Court held that the right of residence for school-going children implies that they can be joined in the host Member State by their primary carer. This right to be joined by the primary carer normally ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.[294]

However, it is also clear from the case law discussed above that not only school-going children have the right to be joined by their primary carer in the host Member State. In cases like *Zhu and Chen, Ruiz Zambrano*[295] and, arguably, *Carpenter*, the Court recognised a right of residence for the primary carer of children who were not going to school, or without treating that fact as an element central to its decision.[296] That does not mean that the fact whether children are attending school is irrelevant for determining the residence rights enjoyed by them and by their primary carer. It would seem to follow from the case law of the Court that school-going children and their primary carer enjoy more extensive residence rights in the host Member State. The cases involving school-going children are different on a number of points.

First, school-going children enjoy more elaborate residence rights age-wise. In cases like *Zhu and Chen*, the Court stressed that the primary carer should be given a right of residence where such was necessary to safeguard the residence rights of a "young minor" who is a national of a Member State. In *Teixeira*, by contrast, the Court made it clear that the residence rights for the primary carer continues at least until the child attains the age of majority.[297] Besides, it must be remarked that the independent right of residence of school-going children of a migrant worker extends even further than the residence rights enjoyed by children in the host Member State in their capacity as family members of a Union citizen. The latter category only enjoys a right of

---

293 As was already apparent from ECJ, Joined Cases 389/87 and 390/87, *Echternach and Moritz* [1989] E.C.R. 723.

294 ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, paras 84-87.

295 As pointed out above, the Court in *Ruiz Zambrano* did not explicitly use the term "primary carer". It did, however, confirm its reasoning in *Zhu and Chen* according to which dependent minor children could not reside independently in one of the Member States if they could not be accompanied by their parent, thereby confirming in an implicit way the residence rights enjoyed by the parent-primary carer of minor, non school-going children.

296 In this connection it must be observed that on the facts of *Ibrahim* it would appear that not all children of the couple were going to school. Since their four children were aged from one to nine (*Ibrahim*, para. 19), it can be assumed that at least their youngest child was not going to school yet. The Court did not, however, make a distinction between the residence rights of the different children.

297 In practice, this distinction will probably not have a great many effects, since children of an older age who live in the host Member State will in most cases attend school in that Member State.

residence if they are under 21 years old or are dependent,[298] whereas no such condition exists with regard to the first category. Second, school-attendance makes a huge difference in the case of children who are not nationals of one of the Member States. While young Union citizens may enjoy the right to be accompanied by their primary carer in the host Member State in order to preserve the useful effect of their right of residence, such is not the case for young third country nationals, since they do not normally enjoy an independent right of residence like Union citizens do. By contrast, children of a migrant worker who have the nationality of a third country can derive an independent right of residence from Article 12 of Regulation 1612/68 when they attend school in the host Member State.[299] The *Baumbast and R* line of cases is not limited to school-going children who have the nationality of a Member State.[300] Third, the right of residence enjoyed by school-going children – at least those of a migrant worker (see the discussion under IV.B.2.a.ii., *infra*) – is an independent right of residence, which cannot be made subject to restrictive conditions such as those relating to self-sufficiency. Non school-going children, by contrast, can only rely on the general right of residence enjoyed by Union citizens, subject to the restrictive conditions surrounding that right. In *Zhu and Chen*, for instance, baby Catherine's right of residence in the UK was dependent on demonstrating possession of sufficient resources not to become a burden on the UK's social assistance system and of a comprehensive sickness insurance.[301] In cases *Ibrahim* and *Teixeira*, by contrast, the Court held that the right of residence of the school-going children concerned and their primary carer could not be made subject to those conditions.[302]

The bottom-line is that school-going children most probably have a stronger claim to residence in the host Member State (for themselves and for their primary carer) than non school-going children. The question is whether the distinction between school-going children and non school-going children in terms of the right they enjoy is justified. In my view, there are two important justifications for this distinction. In the first place, access to education in the host Member State has a very important place in the Union legal order, as is confirmed by the great many high profile cases dealing with it.[303] It comes as no surprise, therefore, that the ECJ has showed itself prepared to give a generous interpretation to the rights of school-going children. While these

298 See Article 2(2) of Directive 2004/38.

299 See Article 10(1) of Regulation 1612/68: "The following shall, *irrespective of their nationality*, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants" (emphasis added). See also the wording of Article 12(3) of Directive 2004/38, which clearly states that it applies "irrespective of nationality".

300 In the *Baumbast* case, one of the children of Mr. Baumbast had only the nationality of a third country (ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, paras 16-17).

301 Higher I have argued that the condition of self-sufficiency could also be imposed by the Member States in *Ruiz Zambrano* like circumstances (see Chapter 4, under III.B.4., *supra*).

302 As was already pointed out, in *Ibrahim*, the youngest children presumably did not go to school yet. Yet the Court did not make a distinction between their residence rights – and the restrictive conditions normally surrounding them – and those enjoyed by school-going children. The reason is probably that it would have been unrealistic to make a distinction between the different members of one family who could not reside independently in any event. One could argue that the residence rights of the youngest children in the case hinged on those of their older school-going siblings. Besides, granting residence rights to the youngest children would also seem to have been required by Article 8 ECHR.

303 For a recent example, see ECJ, Case C-73/08 *Bressol and Other* [2010] E.C.R. I-2735, with a case note by Cambien in (2010) *SEW,* 423-426.

rights were initially conceived of by the Union legislator as accessory rights which had to facilitate the integration of the migrant's workers family in the host Member State, they have come to be considered by the Court as independent rights, which entail entitlement to residence in the host Member State. Cross-border education is vital for the Union's social and political cohesion and economic performance.[304] For this reason, children who go to school in a Member State other than that of their nationality do have a greater claim for residence in that State than children who do not.

In the second place, children who attend school can be presumed to be more integrated in the society of the host Member State, which makes it more difficult for that Member State to justify interferences with their residence rights.[305] However, this argument is only valid with regard to children who have pursued education in the host Member State for a certain period of time. Children who have just started education in the host Member State cannot be expected to be integrated in the society of that State and thus have no stronger claim to residence on the basis of this second justification. Below I argue, accordingly, that Member States can restrict the enjoyment of the independent residence right of school-going children and their primary carer to children who have pursued education in the host Member State for a certain period of time, at least where it is accompanied with a recourse to the social assistance system of the host Member State.[306] While the present case law does not give clear guidance on whether Member States are allowed to impose such durational requirements,[307] allowing it would have two main advantages. First, it would restrict the independent rights to those school-going children who have a justified claim for such right, and thus be in accordance with the justifications for making a distinction between school-going and non school-going children in this regard. Second, it would limit the possibilities for claiming rights in the host Member States to certain categories of family members and thereby reduce the financial burden for Member States.

ii) Children of migrant workers vs children of other Union citizens

The more intriguing question is whether school-going children of (former) migrant workers and their primary carer enjoy more residence rights under Union law in the host Member State than school-going children of other Union citizens – non-economically active Union citizens in particular – and their primary carer. In *Baumbast*, *Ibrahim* and *Teixeira*, the Court based the residence rights of the children

304 See the discussion in Cambien, "Student Mobility in the European Union: Facing New Hurdles?" (2009) 11 *Revista Universitaria Europea*, 77-99.

305 See, in particular, ECJ, Case C-209/03 *Bidar* [2005] E.C.R. I-2119.

306 See under IV.B.2.a.ii., *infra*.

307 O'Brien points out that the Court does not seem to require a substantial period of school-going and thus even children that have recently arrived in the host Member State and have just started schooling there seem to be entitled to rely on the more generous residence rights enjoyed by school-going children, despite the fact that they are hardly integrated in the host Member State (O'Brien, "Case C-310/08 London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department, Judgment of the Court (Grand Chamber) of 23 February 2010; Case C-480/08 Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department, Judgment of the Court (Grand Chamber) of 23 February 2010" (2011) 48 *CML Rev.*, 216). I discuss this point in a more detailed and nuanced way below.

concerned and those of their primary carer on Article 12 of Regulation 1612/68. Consequently, the reasoning followed by the Court would seem to apply only to children who at some point in time enjoyed a right of residence in host Member State as family member of a migrant worker, since Regulation 1612/68 is only applicable to the free movement of workers. At the same time, it must be remarked that the Court specified in *Teixeira* that it was not required that one of the child's parents worked as a migrant worker in the host Member State on the date on which the child started in education.[308] Moreover, the Court was rather flexible in accepting a very brief period of work in the host Member State as sufficient in order to qualify as a migrant worker.[309]

The main consequence of the qualification of children as family members of a migrant worker is that they can, where they attend school in the host Member, invoke an *independent* right of residence in the host Member State for themselves and for their primary carer. This right of residence cannot be made subject to the classic conditions of possessing sufficient resources and a comprehensive sickness insurance which have to be met by non-economically active Union citizens[310] (*hereinafter* "classic residence conditions"). Accordingly, where a migrant worker loses this status in the host Member State and where his children and their primary carer by that fact become family members of a non-economically active Union citizen, they still do not have to meet the classic residence conditions in order to continue to be entitled to residence in the host Member State. They can, moreover, rely on the right to equal treatment with regard to, for instance, welfare benefits in the host Member State, as is clearly illustrated by *Ibrahim* and *Teixeira*.

It is an open question whether children of a non-economically active Union citizen who attend school also derive from this fact an independent right of residence in the host Member State which is not subject to satisfying the classic residence conditions. Such would make an important difference in the case of school-going children of a non-economically active Union citizen who no longer meets the classic residence conditions for himself and his family members. If children in such circumstances too enjoyed an independent right of residence, they would be entitled to remain in the host Member State for the duration of their schooling, together with their primary carer. The Court's case law so far does not provide unequivocal guidance on this point since, as was already remarked, the line of cases starting with *Baumbast and R* were decided under Article 12 of Regulation 1612/68, which does not apply to such children.[311] Two lines of reasoning are possible in order to decide this point.

---

308 ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, paras 71-75.

309 See X, "Editorial: Three paradoxes of EU citizenship", *E.L.Rev.* 2010, 129-130. The Court's relaxed stance is clearly apparent in the *Ibrahim* judgment. Mr. Yusuf, Ms. Ibrahim's husband, had only been employed in the UK for a total of about eight months and had claimed incapacity benefits in the UK for an additional nine months. The Court considered this to be sufficient in order for him to fall within the scope of the provisions on the free movement of workers.

310 See Article 7(1)(b) of Directive 2004/38.

311 In a recent case from the English Court of Appeal, *Jeleniewicz v Secretary of State for Work and Pensions* [2008] EWCA 1163; [2009] 1 C.M.L.R. 21 (cited by Currie, "EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law" (2009) *Journal of Social Security Law*, 96), the right to residence as a primary carer was invoked by a non-economically active mother of a child in a situation where the classic residence conditions were not satisfied and were no recourse was possible to Article 12 of Regulation 1612/68. However, the claim was rejected, essentially because the child's right of residence in the host Member State was not accepted. The Court of

On the one hand, one could point out that, even after the entry into force of Directive 2004/38, a clear distinction is maintained between economically active Union citizens and non-economically active Union citizens.[312] The distinction is clear, first and foremost, in the different conditions that have to be met for residence for periods of more than three months in the host Member State. While non-economically active Union citizens have to meet the classic residence conditions, no additional conditions have to be met by economically active Union citizens besides economic activity.[313] The reason for this distinction is that economically active Union citizens can be expected, on account of their economic activity, to gain a sufficient income for themselves and their family members not to become a burden on the social assistance system of the host Member State. Economically active Union citizens can, moreover, be expected to contribute to the financing of that system through the payment of taxes and social security contributions. For this reason presumably, economically active Union citizens and their family members enjoy wider access to certain social benefits than non-economically active Union citizens and their family members.[314] Similar financial arguments could be invoked to justify subjecting the right of residence of school-going children of economically active Union citizens to a different regime than the right of residence of school-going children of non-economically active Union citizens. Indeed, one could argue that the right of residence of the first category could not be made subject to the classic residence conditions since in that case the Union citizen will in the past have made a contribution to the social assistance system of the host Member State, whereas no such argument applies for the second category.[315]

In my view, this first line of reasoning, which is essentially based on financial arguments, has a number of problematic aspects to it. First, if contributions to the social assistance system of the host Member State are taken as a relevant distinguishing criterion, the more generous residence rights enjoyed by school-going children should be enjoyed by the children of all categories of economically active Union citizens, including employed and self-employed Union citizens.[316] Yet, if

---

Appeal did not, therefore, explicitly consider the scope of residence rights enjoyed by primary carers in such circumstances.

312 See, on this distinction, in some detail: White, "Revisiting Free Movement of Workers" (2009-2010) *Fordham Int'l L.J.*, 1564. See also the discussion in Nic Shuibhne, "The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?", in Barnard and Odudu (eds.), *The Outer Limits of European Union Law* (Oxford and Portland, Hart Publishing, 2009), 167-195. For an interesting argument that the provisions on Union citizenship may actually exert a negative influence on the rights enjoyed by economically active persons, see O'Leary, "Developing an Ever Closer Union Between the Peoples of Europe?" (2008) *Edinburgh Mitchell Working Paper 6/2008, available at* www.law.ed.ac.uk.

313 Article 7(1) of Directive 2004/38. Besides, economically active Union citizens can retain a right of residence under conditions which are not open to non-economically active Union citizens (see Article 7(3) of Directive 2004/38). Economically active citizens can, under certain circumstances, also obtain a right of permanent residence before non-economically active Union citizens can (see Article 17 of Directive 2004/38).

314 See Article 24(2) of Directive 2004/38 and ECJ, Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] E.C.R. I-4585, with a case note by Fahey in (2009) *E.L.Rev.*, 933-949 (social assistance) and ECJ, Case C-158/07 *Förster* [2008] E.C.R. I-8507, with a case note by Schrauwen in (2009) *N.T.E.R.,* 77-83 (financial support for students).

315 See, in this sense, explicitly, Opinion of AG Kokott in Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, r.o. 81.

316 The Court will have the opportunity to clarify its case law on this particular issue in pending Cases C-147/11 *Czop* and C-148/11 *Punakova*.

those rights are derived exclusively from Article 12 of Regulation 1612/68, children of self-employed persons are excluded, since that Article does not apply to them. Second, it must be pointed out that the supposed contributions to the social assistance system of the host Member State can be relatively small. As is well illustrated by the *Ibrahim* case, a very short period of work in the host Member State suffices in order to be qualified as a migrant worker. Article 12 of Regulation 1612/68 can thus be relied on by children of the person concerned to obtain a right of residence in the host Member State for very substantial periods.[317] It can seriously be questioned whether, in such circumstances, the supposed contribution to the social assistance system makes a real difference which justifies making the distinction stated above. Admittedly, it could be countered that in most cases migrant workers will make a substantial contribution to the social assistance system of the host Member State and that one should consider the contributions of migrant workers "viewed as a group".[318] Still, the existence in some cases of a hugely disproportionate relation between a relatively small contribution to the social assistance system and the ensuing entitlement to rely on it for many years obviously weakens the persuasiveness of the financial argument set out above. Third, financial arguments are not the crux of the Court's argument in the cases discussed above in which it recognised an independent right of residence for school-going children and their primary carer. This will be further explained in the following.

On the other hand, one could point out that the Court, in the cases in which it recognised an independent right of residence for school-going children, appears not to have been concerned with primarily financial arguments. In those cases, the Court essentially based its findings on the need to preserve the *effet utile* of the right to access to education in the host Member State for children of migrant workers, which is warranted in order to ensure their integration into the society of the host Member State.[319] Precisely for this reason, the Court held that their residence rights and those of their primary carer could not be made subject to restrictive conditions such as the classic residence conditions. It should be clear that children of non-economically active Union citizens similarly enjoy a right of access to education in the host Member State.[320] It could be argued that, once such children have obtained a right of residence in the host Member State and once they attend school there, they should similarly obtain an independent right of residence for themselves and for their primary carer which cannot be made subject to restrictive conditions such as the classic residence conditions. This argument would, by analogy, be based on the need to preserve the *effet utile* of the right to access to education in the host Member State for children of Union citizens.

---

317 On the facts of the case of *Ibrahim*, a period of work of less than one year in the UK seems to be sufficient to entitle four children of a very young age to reside in the UK and finish their schooling there – possibly including higher studies – while being entitled to rely for their maintenance on welfare benefits.

318 See Opinion of AG Kokott in Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, para. 81.

319 I do not consider here the Court's fundamental rights based argument. I will turn to that argument below.

320 See Article 24 of Directive 2004/38, which also applies to access to education.

In fact, the Union legislator has (partially) confirmed this point of view in Article 12(3) of Directive 2004/38, to which the Court explicitly referred to support its reasoning in *Ibrahim* and *Teixeira*.[321] That Article states:

> "The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies."

The right laid down in Article 12(3) applies to school-going children of all categories of Union citizens covered by Directive 2004/38 – *i.e.* economically active and non-economically active Union citizens – and is not subject to the classic residence conditions.[322] Consequently, it would *prima facie* seem to grant a residence right to school-going children of non-economically active Union citizens similar to the one that derives from Article 12 of Regulation 1612/68. However, Article 12(3) is only applicable in the event of death or departure of a Union citizen from the host Member State. It does not, on its face, apply in the case of a non-economically Union citizen who continues to reside in the host Member State after no longer fulfilling the requisite conditions.[323]

All the same, it could be argued that the non-application of the substance of Article 12(3) in such circumstances would undermine the aim pursued by the Article, namely safeguarding the right to access to education for school-going children of a Union citizen in the host Member State. One could point out that there is no apparent reason why school-going children would be more deserving to continue their schooling in the host Member State when their parent dies or leaves the Member State than when he or she, for instance, falls without sufficient resources but continues to reside there.[324] One could argue, therefore, that the Court should adopt a wide interpretation of Article 12(3), going beyond its literal wording, and finding application in all circumstances where the Union citizen whose children attend an educational establishment in the host Member State loses his entitlement to residence in that State.[325] In all such circumstances, the right of residence in the host Member State for

---

321 See ECJ, Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, paras 57-58: ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, paras 68-69.

322 This clearly ensues when Article 12(3) is contrasted with Articles 12(1) and (2) of the Directive.

323 The most obvious example is that of a Union citizen who initially had sufficient resources and a comprehensive sickness insurance cover in the host Member State, but later lost one of these. Interesting to note is that Article 12(3) of Directive 2004/38 could not be applied in *Ibrahim* because it did not concern a case of departure or death: Mr. Yusuf had ceased to be a worker in the UK before he departed from the UK in 2004 and hence his entitlement to residence was not lost through his departure (Opinion of AG Mazák in Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 14). See also the discussion in Currie, "EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law" (2009) *Journal of Social Security Law*, 88-89.

324 In this connection, it is possible to draw an interesting parallel between Article 12(3) and Article 16(4) of Directive 2004/38. Article 16(4) only refers to periods of absence from the host Member State. Yet the Court has considered that it should apply by way of analogy to periods of unlawful residence in that Member State (ECJ, Case C-325/09 *Dias* [2011] E.C.R. nyr., paras 63-65).See also Opinion of AG Trstenjak in Case C-325/09 *Dias* [2011] E.C.R. nyr., paras 101-109.

325 See Starup and Elsmore, "Taking a Logical Step Forward? Comment on Ibrahim and Teixeira" (2010) 35 *E.L. Rev.*, 583-584.

the children concerned would continue until they finish their schooling. The same would be true for their primary carer, at least until they reach the age of majority.

The second line of reasoning is not without problems either. One could object that the wide interpretation suggested of Article 12(3) of Directive 2004/38 goes against the apparent will of the legislator, who limited Article 12(3) to cases of death or departure of the Union citizen concerned. Besides, the wider interpretation of Article 12(3) would take away much of the added value of Article 12 of Regulation 1612/68, an Article which was preserved by the Union legislator even after the adoption of Directive 2004/38, as was forcefully pointed out by the ECJ in *Ibrahim* and *Teixeira*. Moreover, accepting the second line of reasoning would have far-reaching financial consequences. Union citizens could be tempted to travel to a Member State with a generous welfare system, together with their family members, in order to claim social benefits by relying on the above reasoning. The typical scenario suggested would be the following. After having obtained an initial right of residence in the host Member State for themselves and their family members – in their capacity of economically active or non-economically active Union citizens –, Union citizens would enrol their children in an educational establishment in that Member State. Once these children enrolled in such an establishment, they would be entitled to an independent right of residence which could not be made subject to the classic residence conditions. Such an independent right of residence would, moreover, also accrue to their primary carer and, arguably, both parents could qualify as primary carer.[326] Accordingly, this construction would allow Union citizens the possibility to continue to remain in the host Member State, despite not satisfying the conditions of Directive 2004/38, and to claim social assistance there. This could *prima facie* give rise to a "horror scenario" for certain Member States which would see themselves flooded by "welfare tourists".[327]

The bottom-line is that the second line of reasoning runs counter to serious objections, in particular the fact that it does not respect the apparent will of the Union legislator and entails serious financial consequences for the Member States. It is likely therefore that the first line of reasoning will be adhered to by the ECJ, despite its problematic aspects described higher. Still, the possibility cannot be totally excluded that the ECJ would be willing, in the circumstances of a particular case, to adopt a reasoning similar to the second line of reasoning set out above. The Court could base this on the consideration that the wide interpretation suggested is the one only one which can adequately safeguard the interests of school-going children and guarantee their access to education in the host Member State. Moreover, the fact cannot be ignored that the very recognition in the case law of a right of residence for school-going children and their primary carer is based on a broad teleological interpretation.

---

326 See the discussion under IV.B.c., *infra*.

327 Telling in this connection is the point of view taken in an article that appeared in the British tabloid *The Sun* on the occasion of the ECJ's judgment in the *Ibrahim* case. The picture accompanying the article shows Ms. Ibrahim, wearing a headscarf, standing next to a big flat screen television. See Wells, "House this for lunacy?", *The Sun*, 25 February 2010, available at http://www.thesun.co.uk/sol/homepage/news/2867802/Illegal-immigrant-mum-gets-four-bedroom-house.html. Of course, it must be pointed out that the opinions voiced by *The Sun* on EU affairs are not necessarily representative for the opinions held by UK government officials. Still the article illustrates some of emotions or lines of reasoning that the two judgments could evoke with certain of them. Below I will argue that any inferences regarding welfare tourism must be nuanced.

Consequently, the argument that Article 12(3) of Directive 2004/38 should be interpreted literally should not be given undue weight. The same is true for the argument that a wide interpretation of Article 12(3) would give rise to "creative use" of the residence rights accruing to school-going children and their primary carer, as outlined above. It must be pointed out, first, that such creative use is possible in any event under Article 12 of Regulation 1612/68 and Article 12(3) of Directive 2004/38. Relying on the latter provision, for instance, a Union citizen could briefly leave the host Member State in which his children are pursuing education, in order to obtain an independent right of residence for the latter and for himself in the capacity of their primary carer. Moreover, it follows from the case law that the application of the provisions on Union citizenship can not be resisted by the argument that they entail financial consequences for one or more Member States. As the ECJ has consistently held, the provisions of Union citizenship entail a certain degree of financial solidarity.[328]

At the same time, the degree of financial solidarity implied by Union citizenship is not without limits. For this reason, Member States are entitled to limit, under certain circumstances, the residence rights of Union citizens from other Member States and their family members. If the ECJ were to adopt the second line of reasoning set out above, a careful use of these possibilities would perhaps be the most appropriate way to address the financial concerns of the Member States in connection with the creative use of residence rights for school-going children. First of all, it is trite law that a Member State is entitled to take measures designed to prevent individuals from improperly or fraudulently taking advantage of provisions of Union law.[329] Accordingly, a Member State is entitled to put an end to an abuse of Article 12 of Regulation 1612/68 or Article 12(3) of Directive 2004/38 and to revoke a fraudulently obtained right of residence under one of those provisions.[330] Whether or not there has been abuse must be examined objectively on the basis of a comprehensive appraisal of all the circumstances of the individual case and cannot be inferred from the mere recourse to the rights granted by the provisions just mentioned.[331] Any measure to refuse, terminate or withdraw a right that was fraudulently obtained must, moreover,

---

328 See, *inter alia,* ECJ, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. 44; ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, paras 91-93. For a discussion, seeRoss, "The Struggle for EU Citizenship: Why Solidarity Matters", in Arnull, Barnard, Dougan and Spaventa (eds.), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Oxford and Portland, Hart Publishing, 2011), 283-300.

329 See *inter alia* ECJ, Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] E.C.R. 1299, para. 13; ECJ, Case C-148/91 *Veronica Omroep Organisatie* v *Commissariaat voor de Media* [1993] E.C.R. I-487, para. 12; ECJ, Case C-212/97 *Centros* [1999] E.C.R. I-1459, para. 24; ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 75. This principle is explicitly confirmed in Directive 2004/38 with regard to the rights conferred by that Directive (see Article 35 of Directive 2004/38).

330 See, in this connection, Opinion of AG Kokott in Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, para. 83. See also recital (15) in the preamble to Directive 2004/38, stating: "Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and *in certain conditions to guard against abuse*, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis." (emphasis added).

331 See *inter alia* ECJ, Case C-478/98 *Commission* v *Belgium* [2000] E.C.R. I-7587, para. 45; ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607, para. 55; ECJ, Case C-196/04 *Cadbury Schweppes* [2006] E.C.R. I-7995, paras 36 and 37.

be proportionate and comply with certain procedural safeguards.[332] At the same time, it must be pointed out that the Union Courts have been very reluctant to accept the argument of an abuse of Union law provisions, even in cases where the reliance on Union provisions appears to have been part of a well-devised strategy to circumvent certain restrictions deriving from national law.[333] Nevertheless, it is to be hoped that in flagrant cases, like one involving a short-time departure from the host Member State merely in order to "activate" Article 12(3) of Directive 2004/38, abuse of law will in the future be accepted as a real limitation to the rights of the person concerned. A further argument in support of that would be that in such a case not merely provisions of national law are being circumvented, but essential provisions of Union law, namely the classic residence conditions laid down in Directive 2004/38.

Second, it could be argued that the host Member State could reserve the independent right of residence enjoyed by school-going children and their primary carer to children who are sufficiently integrated in the society of that State. This argument draws inspiration from a line of cases in which the Court held that, in order to avoid assistance granted to Union citizens from other Member States becoming an unreasonable financial burden, a Member State may reserve access to certain social benefits – in particular assistance covering the maintenance costs of students – to Union citizens who have demonstrated a certain degree of integration into the society of that State.[334] The Court further held that residence for a certain length of time is an appropriate criterion to determine integration.[335] Admittedly, the *Bidar* case law is concerned with access to financial aid for students and not with access to education itself. Consequently, a Member State could not rely on *Bidar* to limit access to education to those students only who can demonstrate a sufficient degree of integration in their society.[336] All the same, in my view, the independent right of residence for school-going children does not concern purely access to education in the host Member State. In cases where this right is relied on by primary carers who do not satisfy the classic residence conditions, the persons concerned will be entitled to rely on the principle of equal treatment in order to obtain income-subsisting social benefits in the host Member State. These benefits, in a more indirect way than student loans or grants, cover the maintenance costs of the children concerned and enable them to pursue their education in the host Member State.

---

332 See Article 35 of Directive 2004/38, which refers to Articles 30 and 31 of the Directive.

333 For clear examples, see ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925 and ECJ, Case C-109/01 *Akrich* [2003] E.C.R. I-9607 (see para. 36, in particular, where it is stated "Thus, in reply to one question, Mrs Akrich said that they intended to return to the United Kingdom 'because we had heard about EU rights, staying six months and then going back to the UK'. She said that she had been given that information by 'solicitors and others in same situation'."). See also the discussion in Chapter 4, under II.B.b., *supra.*

334 See, in particular, ECJ, Case C-209/03 *Bidar* [2005] E.C.R. I-2119, paras 56-58; ECJ, Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] E.C.R. I-9161, para. 43; ECJ, Case C-158/07 *Förster* [2008] E.C.R. I-8507, paras 48-50.

335 *Ibid.* See further O'Brien, "Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's 'Real Link' Case Law and National Solidarity" (2008) 33 *E.L. Rev.*, 643-665.

336 Access to education can never be made subject to such conditions since, as the Courts have held, the possibility for a student from the EU to gain access to education in another Member State under the same conditions as nationals of that Member State constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaties. See Opinion of AG Sharpston in Case C-73/08 *Bressol and Others* [2010] E.C.R. I-2735, paras 79-82. See also the more detailed discussion in Cambien, "Student Mobility in the European Union: Facing New Hurdles?" (2009) 11 *Revista Universitaria Europea*, 77-99.

Accordingly I would argue that if the Court were to accept the second line of reasoning, it should arguably connect this to its *Bidar* case law and allow Member States, under certain circumstances, to restrict the independent residence right enjoyed by school-going children and their primary carer to school-going children sufficiently integrated in their society. More in particular, the independent right of residence enjoyed by school-going children of a Union citizen who continues to reside in the host Member State without satisfying the conditions of Directive 2004/38 could be reserved to children who are sufficiently integrated in the host Member State in those cases where they would rely on the social assistance system of the host Member State for their maintenance costs.[337] No such limitation could be imposed in the case of school-going children and their primary carer who satisfy the conditions of Directive 2004/38.[338] Accordingly, only children who went to school for a certain period of time could benefit from this right while having recourse to the social assistance system of the host Member State.[339] As remarked higher, such would be in accordance with one of the justifications for making a distinction between school-going children and non school-going children as far as the residence rights enjoyed by them are concerned. Possibly other factors indicating a degree of integration would also have to be taken into account, such as knowledge of the language of the host Member State, for instance. How much "integration" could be asked for is unclear for the moment.[340] If the view just set out were to be accepted, future case law would have to provide guidance on this point.

iii) Conclusion

School-going children and their primary carer enjoy more elaborate residence rights in the host Member State than non school-going children and their primary carer. They can be said to have a stronger claim to residence for two reasons. On the one hand, the right to access to education in cross-border situations is a fundamental aspect of the Union legal order, which warrants additional safeguards. On the other

337 See also the discussion in Currie, "EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law" (2009) *Journal of Social Security Law*, 97-100.

338 This equally applies to persons falling under Article 12(3) of Directive 2004/38, since the Directive itself appears to exempt them from the classic residence conditions.

339 Some support for this view can be found in Opinion of AG Kokott in Case C-480/08 *Teixeira* [2010] E.C.R. I-1107 (see para. 85: "At the time of her application for housing assistance, Ms Teixeira had been living in the United Kingdom continuously for approximately 18 years. Her daughter Patricia is a Union citizen who was born in the host Member State and, presumably, pursued her entire education there. Subject to other findings of fact by the referring court, it may, therefore, be assumed that both Ms Teixeira's situation and that of her daughter represents a relatively high level of integration in the host Member State. In those circumstances, a certain degree of financial solidarity by the Member State appears to be justified so far as they are concerned"). AG Mazák, by contrast, explicitly stated that the length of schooling was not a relevant factor as far as the rights enjoyed under Article 12 of Regulation 1612/68 are concerned (Opinion of AG Mazák in Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 33).

340 As far as maintenance aid for studies is concerned, Article 24(2) of Directive 2004/38 puts a clear limitation on the "integration" that can be asked for, namely five years of residence in the host Member State (see also ECJ, Case C-158/07 *Förster* [2008] E.C.R. I-8507, paras 51-58). I do not consider, however, that this provision applies for our purposes because I am concerned here with social benefits which *de facto* enable students to cover their maintenance costs, but which are not directly aimed at covering maintenance aid for studies.

hand, school-going children can be expected to be more integrated in the society of the host Member State and thus more deserving of residence in that State. In accordance with this last justification, I have argued that Member States can restrict the enjoyment of the independent residence right for school-going children and their primary carer to children who have pursued education in the host Member State for a certain period of time, at least where it is accompanied with a recourse to the social assistance system of the host Member State.

Less clear at present is whether the independent residence right for school-going children and their primary carer is only enjoyed by children of (former) migrant workers or also by children of other categories of Union citizens. I have argued that, while the present case law is limited to children of (former) migrant workers, the underlying principles and justifications possibly apply more generally. Accordingly, the independent residence right for school-going children and their primary carer could be based on a broad interpretation of Article 12(3) of Directive 2004/38 and would thus apply to school-going children of all categories of Union citizens who continue to reside in the host Member State after no longer satisfying the conditions of Directive 2004/38. Accepting this broad interpretation would be apt to safeguard the interests of school-going children, but would at the same time entail problematic financial consequences. For that reason, it will not likely be accepted by the ECJ. Should it nevertheless be accepted, the ensuing financial consequences could be tempered to some extent. The risk of ensuing disproportionate financial burdens for the social assistance systems of the Member States could be overcome by a more relaxed stance on the possibility to tackle abuse of residence rights and by allowing Member States, in certain circumstances, to restrict the residence rights discussed to school-going children who are sufficiently integrated in their society.

b) Primary carer other than parents of a child

The next question which I set out to answer is whether only parents can qualify as the primary carer of children entitled to reside in the host Member State, and thereby enjoy the residence rights described above, or whether other persons such as other family members or even non-family members who effectively take care of children of a Union citizen in the host Member State are also covered.

By way of an introductory remark it should be emphasised that the case law of the ECJ provides firm authority only for the first view. Indeed, as explained above, there have only been four cases in which the ECJ explicitly embraced the concept "primary carer" in the context of Union free movement law,[341] namely *Baumbast and R*, *Zhu and Chen* and, more recently, *Ibrahim* and *Teixeira*. In all these cases, the primary carer whose residence right was disputed was the parent of the children for whom he or she cared and in all these cases the dictum of the judgment explicitly confirms the residence right of "the parent" who is the primary carer of children. The bottom-line is that the ECJ has never confirmed the right of residence of a primary carer other

[341] The ECJ has also explicitly referred to the concept in another context, namely in a case dealing with the primary carer of a disabled child (ECJ, *Coleman* [2008] E.C.R. I-5603). The notion primary carer has a specific meaning in relation to disabled persons, which is not immediately relevant for the purposes of my analysis. For a discussion of the *Coleman* case, see Werker and Swarte, "Ook moeder van gehandycapt kind wordt beschermd door het verbod van discriminatie op grond van handicap" (2008) *Nederlands tijdschrift voor de mensenrechten*, 1155-1162.

than a parent.[342] However, this observation is not such as to end the debate. The argument that the primary carer should have a right to reside with the children for whom he or she is responsible has never been invoked by referring courts with regard to primary carers other than the parents of the child. In the four cases in which the concept was invoked, the residence rights of a parent were at stake. It is an open question whether the ECJ would have come to a different conclusion had the primary carer not been a parent.

Higher I explained that the Court, arguably, based its recognition of a right of residence for the primary carer on two main lines of reasoning, namely an *effet utile* reasoning, on the one hand, and a fundamental rights based reasoning, on the other hand. In the following I endeavour to determine with more precision the scope of primary carers enjoying residence rights, on the basis of these two lines of reasoning and the principles underlying the cases discussed.

i) *Effet utile* reasoning

The Court's main argument to extend the benefit of the free movement provisions to the primary carer was based on the need to preserve the *effet utile* of these provisions. Accordingly, the primary carer derives his or her right of residence from the fact that otherwise the child concerned could not usefully exercise his or her right of residence – which, in turn, might enable this child to exercise his or her right to access to education in the host Member State. Given that the reasoning of the ECJ seems to focus entirely on the interests of the child, it is *prima facie* hard to see why only parents could derive a right of residence from the interests of the child. That doubt is confirmed, moreover, by dicta of the ECJ. The Court does not only refer to "primary carer" in relation to the parent of a child, but also more broadly to the "person who is the primary carer". In *Zhu and Chen,* for instance, the Court states (in paragraph 45):

> "It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the *person* who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence." (Emphasis added)

In this connection, it cannot go unnoticed that AG Tizzano in *Zhu and Chen* explicitly favoured a broad interpretation of the concept "primary carer". In paragraph 92 of his opinion the AG explains, discussing the *Baumbast and R* case, that:

> "The rationale of the abovementioned case-law lies, of course, above all in the requirement of protecting the *interests of the minor*, having regard to the fact that it is precisely that purpose which must be pursued when the power granted to the parents (*or guardian*) to choose the place of establishment of the minor on behalf of the latter is exercised." (Emphasis added)

---

342 It should be noted that in the *Carpenter* case, which in my view already encompassed the same reasoning in a more embryonic form, the primary carer whose residence right was confirmed, was the stepparent of the children concerned. *Prima facie*, and without pre-empting the following detailed discussion, it would seem to be the case, therefore, that at least stepparents can also qualify as "primary carer" for the purposes of Union free movement law. See also McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge, Cambridge University Press, 2006), 47.

This would seem to indicate that the Court's reasoning should not be restricted to the parents of a child[343] - even though the case at hand was concerned with that specific category of primary carers - but could also apply, for instance, to the legal guardian of a child. There is certainly much to be said for this argument. As was explained above, if the rationale of the extension of residence rights to the "primary carer" lies uniquely in preserving the *effet utile* of the residence rights enjoyed by children of a Union citizen, there seems to be no good reason to restrict this extension to the parents, or even to the family members of those children. Put differently, where a child cannot exercise his residence rights if he or she cannot be accompanied by his or her primary carer, it does not matter a great deal whether the latter is a family member or not. In both cases, the *effet utile* of the residence rights of the child will be jeopardised.

However strong this argument in favour of a broad interpretation may seem, I find it not altogether convincing. In my opinion, the argument overstates the importance of the interests of the child as the unique *ratio decidendi* of the ECJ in the cases in which it recognised a right of residence for the primary carer. It overlooks the fact that the ECJ in those cases takes secondary free movement legislation, conferring free movement and residence rights on certain categories of "privileged" family members of Union citizens, as the starting point of its reasoning. In my view, the ECJ's reasoning in fact consists of two steps. First, the ECJ determines whether the person whose free movement rights are disputed belongs to one of the categories of beneficiaries of such rights. It should be clear that ascendants are amongst these beneficiaries, but not siblings or non-family members.[344] Next, the ECJ shows itself prepared to give a broad interpretation of the person's residence rights, even one going against the strict wording of secondary legislation, in order to preserve the *effet utile* of the free movement rights of another category of beneficiaries. The underlying reason for this broad interpretation of secondary legislation lies invariably in the need to protect the rights of the children concerned.

This "two step-reasoning" is clearly present in all the cases discussed above. In *Baumbast and R*, the ECJ first determined that the spouse of a migrant worker and his children were, according to secondary Union legislation, entitled to reside in the host Member State. Subsequently, it considered the applicants so entitled, even despite the fact that they were no longer a (spouse of a) migrant worker. This broad interpretation of the category of the applicants as beneficiaries of free movement rights was motivated by a desire not to compromise the free movement rights of another category of beneficiaries, namely their children. In *Zhu and Chen*, the ECJ first pointed out that dependent ascendants of a Union citizen are entitled to reside in the host Member State in accordance with secondary Union law (first step). Subsequently, the ECJ showed itself prepared to consider Mrs. Chen so entitled, despite the fact that she was not dependent on her daughter.[345] Again, this broad interpretation of one category of beneficiaries of free movement rights, namely ascendants, was motivated by a desire not to jeopardise the exercise of free movement rights by another such category, namely the Union citizen in question herself. In

---

343 See Hofstotter, "A Cascade of Rights, or Who Shall Care For Little Catherine? Some Reflections on the Chen Case" (2005) 30 *E.L. Rev.*, 555.

344 See the discussion under I.B.2., *supra*.

345 As was already pointed out, the Court confirmed this reasoning implicitly in its judgment in *Ruiz Zambrano*.

Carpenter the Court first noted that secondary law on the free movement of persons extended the benefit of free movement rights to the spouse of a Member State national. However, this right only applied where this Member State national was joined by his spouse in another Member State, which was not the case with the Carpenters. Subsequently, the Court considered that Mrs. Carpenter was entitled to residence, even despite this restriction. The reason lay, again, in the fact that Mrs. Carpenter was the primary carer of children and that deciding otherwise would jeopardise the *effet utile* of the free movement provisions. In *Ibrahim* and *Teixeira*, the applicants were the spouse of a (former) migrant worker and thus fell within the categories of beneficiaries of residence rights under secondary Union legislation. The ECJ did consider, however, that their residence rights could not be made subject to other conditions, notably the classic residence conditions, because they were the primary carer of school-going children whose residence rights would otherwise be jeopardised.

As the foregoing demonstrates, the Court in fact consistently takes one of the categories of privileged family members listed in secondary Union legislation as the basis of its reasoning, although it is willing to leave certain of the restrictive conditions surrounding their right of residence unapplied where the person concerned is the primary carer of children entitled to residence in the host Member State. The bottom-line is probably that mostly three categories of family members can invoke a right of residence in their capacity of primary carers. In the first place, ascendants - *i.e.* parents, but also ascendants in a further degree -, could in this way be entitled to residence in the host Member State where they are the primary carer of a Union citizen, even when they are not dependent on the latter. In the second place, such is also true for the spouse of a Union citizen who is the primary carer of the children of the latter. The spouse of a Union citizen will be either the parent or the stepparent of these children and thereby also qualify under the heading "ascendant" of these children, as will be further explained below. In the third place, a similar reasoning could be followed with regard to the registered partner of a Union citizen who is the primary carer of the latter's children, since registered partners are also among the categories of privileged family members.

More doubtful is whether siblings could also be entitled to residence in the capacity of the primary carer of a child in the host Member State. In principle, they cannot qualify under the aforementioned two step-reasoning, since siblings are not amongst the categories of privileged family members. However, one could imagine a situation in which a caretaking sibling came to the host Member State as the child of a Union citizen and, therefore, as one of the latter's privileged family members. Suppose, for instance, that a Union citizen leaves the host Member State and that his youngest school-going children are effectively taken care of by his oldest child, who no longer goes to school. Strictly speaking the oldest child would not be entitled to residence in such a case.[346] However, such could nevertheless be argued on the basis of a flexible application of the two step-reasoning set out above, which takes into account the fact that the oldest child would initially have come to the host Member State as the privileged family member of a Union citizen and the fact that he or she is the primary

[346] Since siblings are not amongst the privileged family members of a Union citizen entitled to accompany or join him in the host Member State and since they cannot rely on Article 12(3) of Directive 2004/38, which confers a right of residence only on "the *parent* who has actual custody of the children" (emphasis added).

carer of children whose residence rights would otherwise be jeopardised. In such a case, a wide interpretation of the provisions of Directive 2004/38 could both pay due respect to the will of the Union legislator and be apt to safeguard the *effet utile* of the rights of the school-going children concerned.

The two step-reasoning described must be endorsed, as it gives due weight to the will of the Union legislator. It would be wrong to ignore the first step in the ECJ's reasoning, which entirely conditions the scope of the second step. The need to preserve the *effet utile* of the free movement provisions can in my view justify leaving unapplied a restrictive condition the application of which would make it impossible to give full effect to the provisions it conditions. It cannot, however, justify establishing new categories of beneficiaries of free movement rights *contra legem*. By doing so, the Court would arguably overstep its constitutional role in that its decisions would no longer be based to a sufficient degree on Union free movement legislation. Entirely disregarding the categories of beneficiaries of free movement rights contained in that legislation and the limitations surrounding them would come down to disregarding the interests of the Member States these provisions are designed to protect. Arguably, this could lead to disproportionate financial burdens for the Member States and to a disproportionate interference with their competences in the field of immigration. The bottom-line is that only the two step reasoning set out would guarantee an appropriate balance between the effective application of the free movement provisions and the interests of the Member States.

It should be clear from this that the *effet utile* reasoning can only justify granting a right to the categories of privileged family members laid down in Directive 2004/38, namely ascendant-primary carers and the spouse or registered partner of one of the parents who is the primary carer of his or her children. Under some circumstances, siblings can perhaps also be considered to fall within these categories, for reasons explained above. By contrast, other family members, such as aunts or uncles, or non-family members, such as the legal guardian of the child, cannot qualify for a residence right in their capacity of "primary carer" on the basis of the said reasoning.

Any extension of residence rights to these other categories of persons could, as explained above, be defended on grounds of the need to safeguard the *effet utile* of the rights of the children concerned. However, an argument that purely focuses on the interests of the children fails to take into account one vital element, namely the fact that the Union legislator has decided to grant a right of residence only to a limited number of categories of persons who stand in a certain relation to the children concerned. The interests of children can trump certain of the restrictions surrounding these categories but they cannot in themselves, in my view, allow the Courts to grant rights to other categories of persons. The fact that the interests of children do not carry an absolute weight is illustrated by Article 12(3) of the Directive, which is set out higher. The Union legislator in that article clearly took the interests of school-going children as its focal point, by conferring a right of residence on them and their primary carer. At the same time it gave a narrow definition of the primary carer, by limiting itself to "the parent who has actual custody of the children" rather than the "parent or guardian", for instance. This indicates that the Union legislator was not prepared to safeguard the interests of the child in all circumstances. The Union Courts must respect this choice, at least in so far as it is in accordance with Article 8 ECHR (see the discussion under IV.B.2.B.II, *infra*).

At the same time, I believe that the *effet utile* reasoning does allow the Court to give a broad interpretation to the categories of family members which can qualify as primary carer. As pointed out, the Directive refers in its Article 2(2)(d) to "the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)". I explained above that the exact meaning of this term is not clear-cut, and that it can be given a restrictive interpretation, namely one that excludes non-biological ascendants.[347] Indeed, the term "direct" may seem to exclude non-biological ascendants, such as stepparents and adoptive parents. If this restrictive interpretation of the category of ascendants - which I reject for reasons explained above[348] - would nevertheless be held to be the correct one, the need to preserve the *effet utile* of the Directive may, in my view, be such as to justify enlarging this category in the case of the primary carer. In my view, non-biological ascendants like a stepparent[349] or an adoptive parent should also be entitled to residence if they are the primary carer of the child. The biological element should not matter in this regard. On the facts of *Zhu and Chen*, for instance, the ECJ should have reached the same conclusion had Mrs. Chen not been the biological mother of baby Catherine, but her adoptive mother. The reason is obvious: such interpretation is required in order to give full effect to the residence rights of baby Catherine. Moreover, this result would be grounded in an interpretation of the provisions of Directive 2004/38, *i.e.* the first step described above would be complied with, since the Union legislator has given residence rights to ascendants of Union citizens. The need to preserve the *effet utile* would merely require, on the facts of this case, to leave unapplied two restrictive conditions surrounding this category of beneficiaries, namely that of dependency and that of biological ties with the child.

ii) Fundamental rights based reasoning

A second justification relied on by the Court in order to extend the benefit of the free movement provisions to the primary carer is the need to respect fundamental rights, the right to respect for family life in particular. As I explained higher, this argument complements and reinforces the *effet utile* argument. The question I will try to answer here is whether the need to respect fundamental rights provides further support for my findings under the previous heading in relation to the scope of the notion primary carer under Union law. Perhaps the need to respect fundamental rights may justify an even wider interpretation of that notion.

Higher I explained how a deportation measure taken against the parent-primary carer of children residing in one of the Member States should, under certain circumstances, be seen as a disproportionate interference with the right laid down in Article 8 ECHR. Article 8 ECHR entails for the Member States not only a negative obligation not to expulse or deport the parent-primary carer where such disproportionately interferes with the right to respect for family life, but also a positive obligation to grant a right of residence to the primary carer in order to make enjoyment of a normal family life

347 See *supra*, under II.B.

348 At least, with regard to adoptive parents (see *supra*, under II.B.).

349 It must not go unnoticed in this regard that the *Carpenter* case was concerned with the residence rights of a stepmother. As I explained higher, in my view, the central element for this decision was the fact that the spouse concerned was the primary carer of her stepchildren.

possible.[350] Of course, it must be pointed out that certain interferences with the right to respect for family life can be justified under Article 8(2) ECHR in view of the legitimate interest States have in conducting an effective immigration policy. In balancing the State's interest against that of the third-country national, a number of criteria are to be taken into account.[351] Higher I argued that, in the context of the EU, the element of care should be the central criterion in this assessment, while the possibility for the child to live with his parent in another State should not be given considerable weight. Hence, a refusal of residence to the parent-primary carer of a young Union citizen will in many circumstances not be justified under Article 8(2) ECHR.[352]

The above discussion dealt only with the residence rights of parent-primary carers. The important question to be answered now is whether these principles also apply to other categories of primary carers. I distinguish three such categories, which I will discuss in the following: 1) other ascendants; 2) other (non-ascendant) family members; and 3) non-family members. In the first place, it seems clear to me that the same principles apply to ascendants of the child other than his parents. Article 8 ECHR indubitably applies to the ties between near relatives, for instance those between grandparents and grandchildren, "since such relatives may play a considerable part in family life".[353] Accordingly, a refusal to the grandparent-primary carer of the right to reside with his Union grandchild in the host Member State will, under similar circumstances, be as hard to justify under Article 8(2) ECHR as a refusal of the parent-primary carer. This reinforces the conclusion reached using the *effet utile* argument.[354] I would add that the same conclusion applies to adoptive parents and stepparents, should they not be considered to be covered normally by the notion "direct relatives in the ascending line". Above I argued that primary carers belonging to one of these categories should be given a residence right in order to preserve the *effet utile* of the free movement provisions. That conclusion is reinforced by the need to interpret the free movement provisions in accordance with Article 8 ECHR. Article 8 ECHR no doubt covers relations between an adoptive parent and an adoptive child.[355] Accordingly, a refusal of residence rights to an adoptive parent could constitute an unjustified interference with the right to respect for family life, in particular where this parent is the primary carer. The same is true where such a right would be refused to a stepparent, as is neatly demonstrated by the *Carpenter* judgment.

---

350 This positive obligation was recognised by the first time by the ECtHR in ECtHR, Judgment of 13 June 1979 in Case No. 6833/74 *Marckx v Belgium*, para. 31. See, more generally, on positive obligations flowing from the ECHR: Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford and Portland, Hart Publishing, 2004), 239 pp.

351 See under IV.A.2., *supra*.

352 Under some circumstances, however, such refusal will be justified. For instance, in the case of a deportation measure taken against a primary carer after criminal conviction in a Member State, the Member State's interest in the prevention of crime could trump that of the right to respect for family life. See in this regard: ECtHR, Judgment of 18 October 2006 in Case No. 46410/99 *Üner v. the Netherlands*, paras 61-67.

353 ECtHR, Judgment of 13 June 1979 in Case No. 6833/74 *Marckx v Belgium*, para. 45.

354 See under IV.B.2.b.i., *supra.*

355 ECtHR, Judgment of 28 October 1998 in Case No. 24484/94 *Söderbäck*, para. 24.

In the second place, it may be argued that other family members than ascendants should also be entitled to residence under Article 8 ECHR if they are the primary carer of a child so entitled.[356] This hypothesis holds that where the primary carer of a child is not his or her (grand)parent but rather his or her aunt or brother for instance, Article 8 ECHR would, under certain circumstances, require that the latter be entitled to residence. Relations between siblings are covered by Article 8(2) ECHR.[357] Accordingly, the same principles outlined above for ascendants *prima facie* apply and there would seem to be a good case for extension of the right of residence to siblings of a Union citizen who are the primary carer of the latter.[358] The same probably applies to aunts or uncles who are the primary carer of a Union citizen.[359]

This extension to other family members is problematic because it would enlarge the categories of privileged family members of free movement rights to family members of a Union citizen who were not considered to have such rights by the Union legislator. Admittedly, one could point at the fact that Union legislation has in any event to be interpreted in accordance with fundamental rights.[360] Still an extension to categories like siblings,[361] uncles or aunts is difficult to couch in terms of interpretation. Rather than interpreting the categories of privileged family members, such would seem to add such categories. That is difficult to reconcile with the constitutional role of the ECJ and would, arguably, unfairly impact on the public finances of the Member States and on their competence in the field of immigration, as explained above.

---

356 See the suggestion by Van Ooik and Staples, "Het recht op gezinsvorming en gezinshereniging volgens het Europese Hof van Justitie. Hoeveel ruimte is er nog voor een restrictief immigratiebeleid voor de lidstaten?" (2002) *N.T.E.R.*, 276.

357 See, *e.g.*, ECtHR, Judgment of 21 October 1997 in Case No. 25404/94 *Boujlifa v France*, para. 36; ECtHR, judgment of 13 February 2001 in Case No 47160/99 *Ezzouhdi v France*, para. 26 and ECtHR, judgment of 19 February 1998 in Case No 26102/95 *Dalia v France*, para. 45. See also van Dijk, "Protection of 'Integrated' Aliens Against Expulsion under the European Convention on Human Rights" (1999) 1 *Eur. J. Migration & L.*, 297-301; Lundström, "Family Life and the Freedom of Movement of Workers in the European Union" (1996) 10 *Int'l J.L. & Pol'y & Fam.*, 267.

358 Some authors have gone even further and argued that Article 8 ECHR requires the right of residence to be extended to siblings of Union citizens, regardless of whether they are the primary carer or not (see Vanvoorden, "Case Zhu and Chen v. Secretary of State for the Home Department" (2005) 4 *Colum. J. Eur. L.,* 319, who wonders whether the circumstances which gave rise to the *Zhu and Chen* case, it could be argued that Article 8 ECHR requires that baby Catherine's little brother should also be given leave to reside in the UK). I disagree: since, as I have argued above, the element of care is the central consideration in deciding that Article 8 ECHR has been violated, that Article will not normally have been violated if a sibling who is not the primary carer is refused residence.

359 See ECtHR, Decision of 3 July 2001 in Case No. 47390/99 *Javeed v. the Netherlands*, in which the ECtHR accepted that there was family life within the meaning of Article 8 ECHR between the applicant and her minor nieces (however, it declared the application inadmissible for, in the circumstances of the case, further elements of dependency involving more than the normal emotional ties were lacking).

360 See in this regard the preamble to Directive 2004/38, which states: "This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union."

361 Higher I have submitted with regard to the *effet utile* argument that it would be possible to argue, under certain circumstances, that siblings fall within the categories of privileged family members. The same reasoning can apply in the context of a fundamental rights based argument.

All the same, it must be pointed out that it is unlikely that there are many circumstances in which Article 8 ECHR would require the conferral of a right of residence on a brother, sister, aunt or uncle of a child, even if they are the latter's primary carer. The *prima facie* conclusion above that other family members who are the primary carer of a Union citizen are afforded the same protection under Article 8 ECHR should be nuanced. It would seem to be the case that interferences with the tie between a parent and his or her child are harder to justify than interference with the tie between a brother and sister for example.[362]

Thym argues in this connection that recent case law of the ECtHR embraces a narrow definition of the notion "family life" as relating only to the "nuclear family" or "core family" of spouses and minor children, while treating relations between other family members under the notion "private life".[363] The notion of "private life" is wider in scope than "family life" and covers a person's "network of personal, social and economic relations".[364] Justifications of interferences with an individual's private life will be assessed differently, taking into account a wider range of factors. According to Thym, the new jurisprudence on private life will entail a more complex balancing act, for which the eight *Boultif* criteria may only be a starting point.[365] It probably follows from this that the element of "care" should be given less weight amongst the different criteria to be taken into account and, hence, that the justification for granting a right of residence to other family members who are the primary carer of a Union citizen is less strong under Article 8(2) ECHR. It could be argued, therefore, that the recent case law of the ECtHR on Article 8 ECHR marks a convergence with the narrow conception of family in recent Union Directives.[366] This convergence is probably not a coincidence, as the ECHR appears to increasingly take Union law and ECJ case law into account when interpreting the ECHR.[367] The bottom-line is that

---

362 See van Dijk, Van Hoof, van Rijn and Zwaak, *Theory and practice of the European Convention on Human Rights* (Antwerp, Intersentia, 2006), 694.

363 Thym, "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Right to Regularize Illegal Stay?" (2008) 57 *Int'l & Comp. L.Q.*, 91 *et seq*. The author refers to ECtHR, judgment of 9 October 2003 (GC) in Case No. 48321/99 *Slivenko et al v Latvia* and ECtHR, judgment of 15 January 2007 (GC) in Case No. 60654/00 *Sisojeva et al v Latvia*.

364 ECtHR, judgment of 9 October 2003 (GC) in Case No. 48321/99 *Slivenko et al v Latvia*, para. 96.

365 Thym points out that decisive factors will include the integration into the labour market, dependence on social assistance, language skills as an indicator of social integration, criminal behaviour, links with the country of origin or their absence and the duration of the stay in the host country (Thym, "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Right to Regularize Illegal Stay?" (2008) 57 *Int'l & Comp. L.Q.*, 94).

366 That is true for Directive 2004/38 (which is the main focus of my analysis), but also for Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12 and Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] O.J. L16/44.

367 For a very clear example of a case in which the ECtHR considers Union free movement law and the way it is interpreted by the ECJ at some length: ECtHR, Judgment of 17 January 2006 in Case No. 51431/99 *Aristimuño Mendizabal v France*, paras 73-79. Conversely, the ECJ increasingly takes the case law of the ECtHR into account. See, *inter alia*, the extensive references to case law of the ECtHR in ECJ, Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] E.C.R. I-6351. The end result is a convergence that is to be welcomed. On this convergence: see, amongst many others, Harpaz, "The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance, coherence and legitimacy" (2009) 46 *C.M.L.Rev.*, 105-141; Balfour, "The Application of the European Convention on Human Rights by the European Court of Justice" (2005) *Harvard Law School Student Scholarship Series, available at* http://lsr.nellco.org/; Lebeck, "The European Court of

the absence of a right of residence for non-ascendants who are the primary carer of a Union citizen will in most circumstances presumably not constitute an unjustified interference with Article 8(2) ECHR.

In the third place, the case for allowing non-family members who are the primary carer of a child, like his or her foster parents[368] or legal guardian,[369] to invoke Article 8 ECHR in order to claim a right to reside in the host Member State with that child is also doubtful. The reason is obvious: it is far from self-evident that the bond between non-family members can qualify as family life. In this regard, it must be pointed out that the notion of family life in Article 8 ECHR is an autonomous concept, which must be interpreted independently of the national law of the Contracting States. The family life to be considered is not *de iure* family life, but *de facto* family life.[370] Accordingly, primary carers not belonging to the legal family of the child are not necessarily excluded from the scope of Article 8 ECHR.[371]

It has long been argued that the relation between foster parents and foster children could constitute "family life" for the purposes of Article 8 ECHR.[372] This point of view has been confirmed by the ECtHR in a recent case in which it held that, in the circumstances of that case, the relation between a child and his foster parents amounted to "family life" in the sense of Article 8 ECHR.[373] The same reasoning

---

Human Rights on the Relation Between ECHR and EC-law: the Limits of Constitutionalisation of Public International Law" (2007) 62 *ZöR*, 195-236; Scheek, "The Relationship Between the European Courts and Integration through Human Rights" (2005) 65 *ZaöRV*, 864 *et seq*.; Lawson, "The Impact of the EU Constitution on the Relationship between Strasbourg and Luxembourg", in Curtin, Kellerman and Blockmans (eds.), *The EU Constitution: The best Way Forward?* (The Hague, Asser Press, 2005), 377-395; Spielmann, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementaries", in Alston, Bustelo and Heenan (eds.), *The EU and Human Rights* (Oxford, Oxford University Press, 1999), 757-780.

368 *Black's Law Dictionary* (9th ed.), (St. Paul, Thomson West, 2009) gives the following definition of "foster parent": "An adult who, though without blood ties or legal ties, cares for and rears a child, esp. an orphaned or neglected child who might otherwise be deprived of nurture, usu. under the auspices and direction of an agency and for some compensation or benefit. Foster parents sometimes give care and support temporarily until a child is legally adopted by others."

369 *Black's Law Dictionary* (9th ed.), (St. Paul, Thomson West, 2009) gives the following definition of "guardian": "One who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability". The Oxford Dictionary of Law (Martin and Law (Eds.), *Oxford Dictionary of Law* (6 ed.), (Oxford, Oxford University Press, 2006), 590 p.) gives the following definition of "guardian": "One who is formally appointed to look after a child's interests on the death of the child's parents".

370 Settled case law of the ECtHR; see ECtHR, Judgment of 18 December 1986 in Case No. 9697/82 *Johnston and Others v Ireland*, cited by van Dijk, Van Hoof, van Rijn and Zwaak, *Theory and practice of the European Convention on Human Rights* (Antwerp, Intersentia, 2006), 690.

371 See for instance, holding that the bond between a father and his non-recognised biological child can amount to family life: ECtHR, Judgment of 1 June 2004 in Case No. 45582/99 *Lebbink v Netherlands*, para. 35.

372 Wortmann and Duijvendijk-Brand, *Compendium van het personen- en familierecht* (The Hague, Kluwer, 2009), 190; van Dijk, Van Hoof, van Rijn and Zwaak, *Theory and practice of the European Convention on Human Rights* (Antwerp, Intersentia, 2006), 693. Van Dijk, Van Hoof, van Rijn and Zwaak refer to the dissenting opinion of Commission member Schermers, attached to the report of the Commission of 14 July 1988, Cecilia and Lisa Eriksson, A.156, p. 56: "Normally, there will be family life between foster parents and their children".

373 ECtHR, Judgment of 27 April 2010 in Case No. 16318/07 *Moretti and Benedetti v Italy*.

could apply *a fortiori* to the relation between a child and his legal guardian,[374] although such has so far never been explicitly confirmed by the ECtHR in its case law. Besides, there is no doubt that, in any event, foster parents and legal guardians can come within the scope of "private life" for the purposes of Article 8 ECHR.[375]

In my view, if the said categories should indeed be considered to fall within the scope of family life, this could require granting residence rights to them if they are the primary carer of a child entitled to reside in the host Member State. The assessment under Article 8 ECHR then becomes parallel to the one with regard to ascendants. From a Union law perspective, this outcome could be based on a wide interpretation of the notion "ascendants", as such would arguably be required by Article 8 ECHR. It could be argued in this connection that the ECJ should be prepared to follow the lead from the ECtHR and consider the factual ties rather than only the blood or legal ties between family members.[376] Accordingly, under certain exceptional circumstances, Article 8 ECHR would require an even wider interpretation of the notion primary carer than is justified under the *effet utile* argument. Admittedly, this wide interpretation would considerably stretch the meaning of the category ascendants beyond the intention of the legislator and thereby have the same problematic consequences as outlined above. However, it must be immediately pointed out that the circumstances in which the relation between a child and his or her foster parent of legal guardian may qualify for family life under Article 8 ECHR will be rare, as is clear from the comparative lack of case law to that effect. Moreover, it can be assumed that there will be more scope for the Member States to justify interferences with the relation between children and their legal guardian or foster parent, in particular when they are treated under the heading "private life" rather than "family life".

Besides foster parents and legal guardians, there is on other category of non-family members that could commonly be the primary carer of a child, namely the unmarried partner of one of the parents of a child, even in the absence of a registered partnership. Unmarried and non-registered partners do not fall within the scope of privileged family members of a Union citizen and cannot therefore be granted a right of residence on the basis of the two step-reasoning set out above. Yet, it is possible that they are part of the *de facto* family of a child. Under such circumstances, Article 8 ECHR might require that they be granted a right of residence in the host Member State together with the child in question. The case law of the ECtHR does not provide unequivocal guidance on this issue, but it seems to indicate that, under certain circumstances, cohabiting unmarried partners are covered by Article 8 ECHR.[377] If that is accepted, the notion of primary carer might have to be enlarged so as to encompass the unmarried partner in order to bring Union law in conformity with

---

374 Since the tie between a child and his or her legal guardian is much stronger from a legal point of view.

375 See van Dijk, Van Hoof, van Rijn and Zwaak, *Theory and practice of the European Convention on Human Rights* (Antwerp, Intersentia, 2006), 693 (referring to ECtHR, Judgment of 8 July 1987 in Case No. 9749/82, *W v. the United Kingdom*, para. 59 and ECtHR, Judgment of 26 May 1994 in Case No. 16969/90, *Keegan*, para. 55).

376 See in this sense Stalford, "Concepts of Family under EU Law - Lessons from the ECHR" (2002) 16 *Int'l J.L. & Pol'y & Fam.*, 410-434.

377 See, for instance, ECtHR, Judgment of 13 June 1979 in Case No. 6833/74 *Marckx v Belgium*; ECtHR, Judgment of 27 October 1994 in Case 18535/91 *Kroon v Netherlands*; ECtHR, Judgment of 26 May 1994 in Case 16969/90 *Keegan v Ireland*.

Article 8 ECHR.[378] That would, again, have the obvious problem of adding a category of beneficiaries of free movement rights against the apparent will of the Union legislator, although it has been suggested that a wide interpretation could be given to the category of "parents", which would encompass unmarried partners.[379] Some support for arguing that unmarried partners fall within the scope of Directive 2004/38 could be derived from its Article 3(2)(b). In any event, it would seem to be the case that, even if the ECJ would be willing to accept that the residence rights of unmarried partners who are the primary carer of a child are protected under the right to respect for family life, Member States would still enjoy a wide margin of appreciation to justify restrictions to this right, on account of their powers in the field of immigration or family matters. This margin would in any event seem to be greater than with regard to married partners.[380] The same obviously applies where the residence rights of the unmarried partner-primary carer are dealt with under the right to respect for private life, rather than the right to respect for family life (see the discussion, *supra*).

iii) Conclusion

On the basis of the fore-going it should be clear that mostly three categories of persons can invoke a right of residence in their capacity of primary carers, namely ascendants of a Union citizen, the spouse of the parent of a Union citizen[381] and the registered partner of the parent of a Union citizen. Exceptionally, siblings of a Union citizen may also qualify for residence under that status, namely where they entered the host Member State as the privileged descendant of the parent of that Union citizen. The category of ascendants should be given a wide interpretation and covers adoptive parents and stepparents. In exceptional circumstances, namely where deciding otherwise would be in violation of the right to respect for family life, it also covers foster parents, legal guardians and, possibly, the unmarried and non-registered partner of one of the parents. Other family members and non-family members are not normally entitled, under the present secondary Union legislation, to derive a right of residence from their capacity of primary carer since the recognition of such a right is difficult to reconcile with the wording and purpose of the present secondary Union legislation and the apparent will of the Union legislator. At the same time, it is undisputed that Member States are not precluded from granting residence rights to a wider scope of persons under their national laws.

---

378 Toner *Partnership Rights, Free Movement and EU Law* (Oxford and Portland, Hart Publishing, 2004), 81-82 and 229-231.

379 Barrett, "Family Matters: European Community law and Third-country Family Members" (2003) 40 *CML Rev.*, 391, footnote 81.

380 See the discussion in Toner *Partnership Rights, Free Movement and EU Law* (Oxford and Portland, Hart Publishing, 2004), 229-231 and 253-254.

381 As was remarked higher, the second category is in fact covered by the first category since the spouse of a parent of a Union citizen will normally be either the parent tor the stepparent of that Union citizen and thereby fall under the category of ascendants. Besides, the case law discussed concerns the primary carer of children who are Union citizens themselves or children of a Union citizen who do not necessarily are Union citizens themselves. In this chapter I focus on the first category.

c) Multiple primary carers

A last question is whether multiple persons could claim a right of residence in their capacity as the primary carer of a child entitled to residence in the host Member State. One can imagine indeed that a child has more than one person who effectively takes care of him. The question is whether these different persons could all derive a right of residence from this fact.

The Court's case law does not provide much guidance on this point. In all cases discussed higher, the primary carer whose right of residence was at issue was the mother of the child. The Court did not have to pronounce on the right of residence of the father in addition to that of the mother. At the same time, it cannot go unnoticed that in *Ruiz Zambrano*,[382] on the facts of the case, both the right of residence of the father and the mother were at stake,[383] although the questions referred for a preliminary ruling and the judgment of the ECJ were concerned only with the rights of Mr. Ruiz Zambrano and not with those of his spouse.[384] As I explained higher, the Court ruled favourably on the possibility for the children of Mr. Ruiz Zambrano to invoke a right of residence in Belgium and on that of Mr. Ruiz Zambrano to invoke a derivative right of residence as their primary carer.[385] The question remains how that will affect the right of residence of Mrs. Ruiz Zambrano in Belgium.[386] While it seems rather evident that she must also be given a right of residence in Belgium,[387] the more difficult question is from what Union legal basis[388] she could derive this right of residence. She could certainly not invoke a right of residence as a dependent ascendant of her children, since she is most definitely not financially dependent on them. Besides, she could not invoke a right of residence as the spouse of a Union citizen, since Mr. Ruiz Zambrano is a third country national. Possibly, she could be entitled to residence as the spouse of a third country national legally resident in Belgium under Directive 2003/86.[389] The problem with that possibility, however, is that Mr. Ruiz Zambrano does not derive his right of residence from having "lawfully resided" in Belgium in accordance with the terms of that Directive, but only enjoys a derivative right as father of Union citizens.[390] Another evident option would be that

382 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr.

383 It is clear from the facts of the case that both Mr. and Mrs. Ruiz Zambrano applied for a residence permit in Belgium (see ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, paras 21-22).

384 The reason for this is most likely that the dispute before the national court (the *Tribunal du travail de Bruxelles*) in fact concerned the rejection by the Belgian authorities of Mr. Ruiz Zambrano's claim for unemployment benefits. The more fundamental question the ECJ had to decide is whether the impact of this decision and the ensuing consequences for the rights enjoyed by his children in their capacity as Union citizens were in accordance with Union law.

385 As pointed out above, the Court did not explicitly use the term "primary carer", although it did confirm its reasoning in *Zhu and Chen*. Instead it used the term "third country national with dependent minor children" (ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 43).

386 See van der Mei, van den Bogaert and de Groot, "De arresten Ruiz Zambrano en McCarthy - Het Hof van Justitie en het effectieve genot van EU-burgerschapsrechten", (2011) *N.T.E.R.,* 194.

387 The Court may implicitly have confirmed this, stating that "if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself *and his family*" (ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para. 44 (emphasis added)).

388 I leave Belgian national law aside for the purposes of my analysis.

389 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] O.J. L251/12.

390 It is not clear whether the residence permit that will be given to Mr. Ruiz Zambrano subsequent to the judgment of the Court can qualify for "lawful residence" under Directive 2003/86. In any

Mrs. Ruiz Zambrano derives her right of residence from the fact that her minor children are dependent on her, similar to what is the case for her husband. Accepting that option, however, necessarily means accepting the possibility that multiple primary carers can invoke a right of residence. I will now consider this possibility in more detail, starting from the Court's two lines of reasoning set out above.

On the one hand, the Court's *effet utile* argument is essentially based on the premise that children cannot exercise their rights independently, in the absence of their primary carer. Put differently, young children can only reside in the host Member State and go to school there if the person who effectively takes care of them is entitled to reside with them in that State. *Prima facie* it can be assumed that more than one person effectively takes care of certain children. It is not controversial to state that in many families, both parents will to some extent take care of their children, who will often need both of their parents to be around. Of course, in such a case it would need to be established that both parents are actually needed by their children in order to exercise their rights. Such could be the case, for instance, where one of the parents works during the daytime, while the other parent takes care of the children, whereas both care for them in the evenings and weekends.[391] That scenario would certainly seem more plausible in the case of young minors than in the case of older children. In the scenario described, there would be two primary carers or, as has been suggested, a distinction could be made between the "primary carer" and the "secondary carer".[392] I prefer not to make such a distinction, since it may convey the impression that the "secondary carer" is less deserving of residence rights in the host Member State. A person who effectively takes care of children and is needed by the latter in order for them to exercise their rights should therefore preferably be labelled a "primary carer".

On the other hand, there is the argument based on fundamental rights, the right to respect for family life in particular. As has been explained higher, the Court has held that:

> "the removal of a person from the country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 of the ECHR, which is among the fundamental rights, which, according to the Court's settled case-law, are protected in [Union] law."[393]

This is highly relevant in the situation I am concerned with here, namely a situation in which two parents effectively take care of their children. If one of the parents would be recognised as the primary carer of children and be entitled to reside with them in the host Member State, but not the other parent, the core family would be forced to separate. It would seem to be the case that such interference with the right to protection for family life will be hard to justify.[394] This is an additional strong

---

event, it appears that in the past Mr. Ruiz Zambrano only enjoyed a provisional residence permit (see ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr, para.32). This does not qualify for lawful residence, as is explicitly stated by Article 3(2)(b) of the Directive.

391 This factual situation comes close to that of the *Carpenter* case, although in that case the father was not considered to be a primary carer.

392 Starup and Elsmore, "Taking a Logical Step Forward? Comment on Ibrahim and Teixeira" (2010) 35 *E.L. Rev.*, 584.

393 ECJ, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] E.C.R. I-5257, para. 98.

394 I refer to the discussion under IV.A.2, *supra*.

argument for recognising the possibility of multiple primary carers deriving a right of residence from Union free movement law.

An interesting question arises in the case of parents who both claim to be the primary carer of their child where at least one of them is a Union citizen. One could wonder whether, when the latter parent is entitled to reside in the host Member State in his or her capacity of primary carer, the other parent could claim a right of residence as his or her spouse or registered partner. In principle, such would not seem to be possible if the parent-primary carer would not reside in compliance with the conditions of Directive 2004/38 and thus the conditions for residence by privileged family members would not be met.[395] Yet, it has been remarked that the primary carer is apparently entitled to rely on other provisions of Directive 2004/38, Article 24 of the Directive in particular.[396] This is arguably demonstrated by the *Ibrahim* case: Ms. Ibrahim was entitled to rely on the right to equal treatment with regard to housing benefits, despite the fact that she was not "residing on the basis of this Directive", as required by Article 24. Yet, the possibility for her to rely on the principle of equal treatment can be defended by pointing out that without this possibility her right of residence and that of her children would be rendered meaningless.[397] Moreover, the Court has held that the possibility to rely on the general right to equal treatment, now laid down in Article 18 TEU, is not necessarily subject to the conditions of Directive 2004/38 being satisfied.[398] Similar arguments do not apply in favour of applying the provisions of Directive 2004/38 relating to the residence rights of family members to primary carers who do not reside in the host Member State in accordance with the provisions of the Directive. Moreover, applying those provisions would unjustifiably impose financial burdens on the Member States. I would conclude therefore that, where the conditions of Directive 204/38 are not satisfied, the parents of a child who is entitled to residence in the host Member State will only be so entitled where they both qualify as his or her primary carer.[399] This would, arguably, only be different if a refusal of a right of

---

395 Of course, if the parent-primary carer resided in compliance with the provisions of Directive 2004/38, he or she would, under the conditions of that Directive, be entitled to be joined or accompanied by his or her spouse or registered partner. In such a case, however, the primary carer would have an independent right of residence as a Union citizen and there would presumably be no need to rely on his status of primary carer. That situation is not the situation I am concerned with here.

396 Schrauwen, "Zelfstandig verblijfsrecht van schoolgaande kinderen van werknemers en hun verzorgers: ontbreken van bestaansmiddelen niet relevant" (2010) *N.T.E.R.*, 236-237. Another interesting discussion is whether the primary carer can rely on Article 16 of Directive 2004/38 in order to derive a right of permanent residence after five years of residence in the host Member State in his or her capacity of primary carer or whether residence in that capacity does not qualify for that provision. I refer to the discussion in O'Brien (n. 307 , *supra*, at 221-223). The Court has never explicitly stated on this question, but it would appear from the case law that only residence in compliance with the conditions laid down in secondary law will qualify under Article 16 of the Directive (see notably ECJ, Case C-325/09 *Dias* [2011] E.C.R. nyr.; see also the more detailed Opinion of AG Trstenjak in Case C-325/09 *Dias* [2011] E.C.R. nyr, paras 84-92 in particular).

397 Ms. Ibrahim had no own income and could not cover the living costs of herself and her children without social assistance.

398 See ECJ, Case C-456/02 *Trojani* [2004] E.C.R. I-7573 and the case note by Van Ooik and Schrauwen in (2005) *SEW,* 42-46.

399 O'Brien similarly concludes that the primary carer's spouse cannot derive a right of residence as the family member which is not subject to the conditions of Directive 2004/38. She seems to reject, however, the possibility that multiple primary carers may be entitled to residence in the

residence to a parent who was not the primary carer would be in violation of Article 8 ECHR.

C. Implementation by the UK

In this section I will look into the consequences for the national immigration laws of the Member States. More precisely, I will analyse what impact the judgments discussed above have had on the drafting of the UK immigration rules. I focus on the UK because the contentious decisions in all cases discussed took place in the UK. For this purpose, I will study how the UK legislator has taken this case law into account and to what extent it has adapted the UK immigration rules accordingly. This study may provide me with a tentative answer to some of the questions raised higher. Moreover, it will provide me with insight into the extent to which the provisions on Union citizenship, through the case law of the Court, can have a real impact on the policies of the Member States and bring them to change their rules so as to guarantee the *effet utile* of the rights enjoyed by Union citizens. In this connection, it should also be possible to draw some conclusions as to whether the current case law, given the uncertainties pointed out higher, provides a workable basis for implementation by the Member States authorities.

As is clear from a recent Commission report, the implementation of Directive 2004/38 is no sinecure. According to the report, no single Member State had, by the time of its drafting, fully and correctly implemented the Directive.[400] It can be expected, therefore, that the said case law, which appears to bring certain nuanced exceptions to the Directive, will not be fully and accurately reflected in the relevant UK provisions. As will become clear in the following, the UK legislator seems to have fully grappled with the consequences of the *Zhu and Chen* case, by adapting the UK immigration rules to that judgment. The more recent *Ibrahim* and *Teixeira* cases, by contrast, appear not yet to have been taken into account by the UK legislator. The resulting picture is rather troublesome as it remains unclear to what extent these cases will have an impact on UK immigration law.

1. Implications of *Zhu and Chen*

It will be remembered that *Zhu and Chen* involved a refusal to grant leave to reside to Mrs. Chen under the UK immigration rules and that the ECJ judged such refusal to be in violation of Union free movement law. Not surprisingly, the UK immigration rules have undergone important changes after the judgment was rendered. Specific sections were inserted that deal with the right of "leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child". New Paragraphs 257C-257E of the Immigration Rules, which entered into force on 1 January 2005,[401] state:

---

host Member State in that capacity, noting that Article 12 of Regulation 1612/68 will mostly benefit "lone parents" and their children (n. 307 , *supra*, at 213).

400 Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final.

401 See the Statement of Changes in Immigration Rules –HC164 December 2004, *available at* http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/.

Requirements for leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child

257C. The requirements to be met by a person seeking leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child are that the applicant:

(i) is:

(a) the primary carer; or

(b) the parent; or

(c) the sibling,

of an EEA national under the age of 18 who has a right of residence in the United Kingdom under the 2006 EEA Regulations as a self-sufficient person; and

(ii) is living with the EEA national or is seeking entry to the United Kingdom in order to live with the EEA national; and

(iii) in the case of a sibling of the EEA national:

(a) is under the age of 18 or has current leave to enter or remain in this capacity; and

(b) is unmarried and is not a civil partner, has not formed an independent family unit and is not leading an independent life; and

(iv) can, and will, be maintained and accommodated without taking employment or having recourse to public funds; and

(v) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

In this paragraph, "sibling", includes a half-brother or half-sister and a stepbrother or stepsister.

Leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child

257D. Leave to enter or remain in the United Kingdom as the primary carer or relative of an EEA national self-sufficient child may be granted for a period not exceeding five years or the remaining period of validity of any residence permit held by the EEA national under the 2006 EEA Regulations, whichever is the shorter, provided that, in the case of an application for leave to enter, the applicant is able to produce to the Immigration Officer, on arrival a valid entry clearance for entry in this capacity or, in the case of an application for leave to remain, the applicant is able to satisfy the Secretary of State that each of the requirements of paragraph 257C (i) to (iv) is met. Leave to enter or remain is to be subject to a condition prohibiting employment and recourse to public funds.

Refusal of leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child

257E. Leave to enter or remain in the United Kingdom as the primary carer or relative of an EEA national self-sufficient child is to be refused if, in the case of an application for leave to enter, the applicant is unable to produce to the Immigration Officer on arrival a valid United Kingdom entry clearance for entry in this capacity or, in the case of an application for leave to remain, if the applicant is unable to satisfy the Secretary of State that each of the requirements of paragraph 257C (i) to (iv) is met.

It is clear from these paragraphs that the UK legislator endeavoured to incorporate the *Zhu and Chen* judgment in the UK Immigration Rules.[402] I will not discuss the above paragraphs in detail, but will instead concentrate on a number of issues which relate to

[402] Not surprisingly, the UK Border Agency "European Casework Instructions ~Free Movement of Persons Directive (2004/38/EC)" refer to Paragraph 257C of the Immigration Rules under the heading "2.5.2. Family Members of EEA Minor Children (*Chen*)" (*available at* http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/).

the discussion above. There are a number of interesting points to make. First, *prima facie* it would seem that the UK legislator considers that not only family members can derive a right of residence from their capacity of "primary carer". Indeed, the headings of paragraphs 257C-257E refer to "the primary carer or relative", which seems to imply that the primary carer in this context is necessarily not a relative of the child. However, a more correct interpretation is probably that "relative" refers to the parent or the sibling of the child (categories "b)" and "c)" in paragraph 257C), whereas "primary carer" covers other close family members. That interpretation is confirmed by the European Casework Instructions of the UK Border Agency, which deal with paragraph 257C under the heading "Family Members of EEA national Minor Children (*Chen*)". In this context the instructions state that "Paragraph 257C of the Immigration Rules allows for non-EEA parents *and other close relatives* of self sufficient EEA children to be granted leave to enter or remain in the UK" (italics added).[403] This interpretation is more consistent with my interpretation outlined above since it does not exclude grandparents, great-grandparents *etc*. At the same time, it is clear that, in any event, the definition of "primary carer" is not limited to ascendants. Aunts or uncles for example could also be considered as close relatives and thus qualify as primary carer. Siblings, on the other hand, will not normally qualify as primary carer. They are in principle[404] entitled to residence only if they fulfil the conditions of "iii)", which means *inter alia* that they must be under eighteen. Parents, by contrast, seem to qualify if they fulfil the conditions of paragraph 257C, regardless of whether they are the primary carer of their child. It should be clear from this, and from the discussion above, that in my view the UK legislator has given a broader definition of the notion "primary carer" than was required under Union law.

Second, while the ECJ in *Zhu and Chen* referred to the "primary carer of a young minor",[405] the UK legislator simply requires the child to be under the age of eighteen. In other words, it has not limited the category of minors in any way to a subcategory of "young minors". On the one hand, this may be more far-reaching than is required under Union law. Indeed, as I have explained above, the ECJ's holding in *Zhu and Chen* referred to a "young minor" and there are convincing reasons to argue that the justifications for granting a right of residence to the primary carer will not apply – depending on the circumstances of the case – in the case of older children. Older children can, in certain circumstances, reside independently and without a need for a

---

403 Further confirmation of this interpretation is provided by the entry clearance website of the UK Border Agency (*available at* http://www.ukvisas.gov.uk/en/ecg/), under EUN 5.5 which suggests the following "refusal wording": "Not the primary carer or relative of EEA national child: '... but I am not satisfied that you are the primary carer, the parent of the sibling of an EEA national under the age of 18 who has a right of residence in the United Kingdom under the 2006 EEA Regulations as a self-sufficient person'".

404 The structure of paragraph 257C seems to indicate that siblings can only qualify if they satisfy the additional conditions of "iii)". Nevertheless, under a strict reading of that provision, it cannot be excluded, that a sibling who does not satisfy those conditions could still qualify for residence under the category "primary carer".

405 See, *inter alia*, the dictum of the ECJ in *Zhu and Chen*: "In circumstances like those of the main proceedings, [Article 21 TFEU] and Council Directive 90/364/EEC of 28 June 1990 on the right of residence confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State."

primary carer to look after them. On the other hand, it appears that the UK legislator, with regard to school-going children, has been too restrictive. Indeed, it clearly results from *Ibrahim* and *Teixeira* that the residence rights for school-going children and their primary carer do not necessarily end when the former attain the age of majority. I will come back to this point in more detail below.

Lastly, the immigration rules do not confer a fully-fledged right of residence on the primary carer. Both condition "iv" of paragraph 257C and the last sentence of paragraph 257D deny the primary carer the right to take up employment in the UK. This contrasts with the rights of what I have called privileged family members, who, under Article 23 of Directive 2004/38, are entitled to take up employment or self-employment in the host Member State. The UK Border Agency European Casework Instructions state in this regard (at paragraph 2.5.2.):

> "The ECJ case of CHEN ruled that an EEA national child who holds sickness insurance would have a right to reside in the UK with his/her non-EEA national parents provided there were sufficient resources to ensure that the child did not become a burden on public funds […].
> This ruling did not say that the EEA national child's parent would have a right to reside as a 'family member' as defined in [EU] law because the parent will not be financially dependent on a child. The parent is entitled to reside in a Member State with his or her child solely to facilitate the child to exercise his or her Treaty rights. The ruling did not give non-EEA national parents the right to work."[406]

Consequently, the UK authorities seem to take the view that the primary carer is only entitled to reside in the host Member State in order to make it possible for the child to reside there. He or she does not have the right to take up employment, nor to have recourse to public funds.[407] The underlying reasoning seems to be based on the fact that the primary carer is only entitled to reside with a child who is self-sufficient (the condition required by Union secondary law in the case of non-economically active Union citizens). This is taken to mean that the child should draw on resources that do not derive from the host Member State.[408] Otherwise a circular reasoning could ensue[409]: the child would be entitled to reside in the host Member State if his or her primary carer was employed there (and hence could provide the necessary financial resources in order for the child to be self-sufficient), and the latter would derive his entitlement to take up employment from the fact that he or she was residing with a self-sufficient child. The bottom-line is that child's financial resources may not derive from the employment of his or her primary carer in the host Member State or from the latter's recourse to the social assistance system of the host Member State.

It can be wondered, however, whether this interpretation of the *Zhu and Chen* judgment is in accordance with Union law. The judgment itself does not explicitly

---

406 See, similarly, the entry clearance website of the UK Border Agency (*available at* http://www.ukvisas.gov.uk/en/ecg/), under EUN 5.2.

407 See paragraph 257D of the Immigration Rules.

408 Clayton, *Textbook on immigration and asylum law* (3rd ed.), (Oxford, Oxford University Press, 2008), 190-191 and the case-law referred to.

409 Clayton, *Textbook on immigration and asylum law* (3rd ed.), (Oxford, Oxford University Press, 2008), 191; Hofstotter, "A Cascade of Rights, or Who Shall Care For Little Catherine? Some Reflections on the Chen Case" (2005) 30 *E.L. Rev.*, 555.

consider the right for the primary carer to work in the host Member State.[410] The question did not arise, probably because the Chens had sufficient income from their family business based in China.[411] Still, it is clear from the facts stated by the Court that it was Mrs. Chen's employment that provided for the needs of both herself and baby Catherine.[412] Two observations may provide an answer to this question. On the one hand, it is certainly legitimate for the UK legislator to tend to avoid a situation in which the primary carer and the child become a financial burden on its social assistance system. That is in line with the purpose of Directive 2004/38. Accordingly, it may refuse leave to remain to a primary carer where the latter has no income and is likely to have recourse to public funds. On the other hand, this purpose does not in all circumstances justify a refusal for the primary carer to take up work. In a situation where the primary carer has a genuine job offer, or where he or she is lawfully employed in the host Member State, there is no real risk of a financial burden on the social assistance system. Still, in the UK, under such circumstances, the primary carer and the child he or she accompanies have no right of residence.[413]

It follows, in my view, that the complete prohibition for the primary carer to take up employment is a disproportionate interference with the free movement rights enjoyed by minor Union citizens. This view seems to be confirmed to some extent by the *Ruiz Zambrano* judgment.[414] Moreover, the prohibition goes directly against an important *rationale* of Union free movement law, which is to promote the integration of family members in the host Member State in order to give full effect to the free movement provisions. It is preferable, as I have argued above, to accord the primary carer the same residence rights as the privileged family members. Such would be in accordance with my view that granting a residence right to the primary ultimately rests on a (broad interpretation) of the category of ascendants, a category of privileged family members.[415] It must be remarked that the prohibition is, when applied strictly, in any event not in accordance with the Court's judgment in *Ibrahim* and *Teixeira*. In those cases the Court affirmed that the classic residence conditions did not apply to the independent residence rights enjoyed by school-going children of a (former) migrant worker and their primary carer. Accordingly, the fact that the primary carer relied on the social assistance system of the host Member State for her income did not in itself take away their entitlement to residence.

---

410 Interesting to remark is that Article 8 ECHR does not guarantee either to the persons concerned the right to a particular type of residence permit (see ECtHR, Judgment of 17 January 2006 in Case No. 51431/99 *Aristimuño Mendizabal v France,* para. 66).

411 Clayton, *Textbook on immigration and asylum law* (3rd ed.), (Oxford, Oxford University Press, 2008), 190.

412 ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 13.

413 See *ER and others (Ireland)* [2006] UKAIT 00096.

414 ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr. See the detailed discussion in Chapter 4, *supra*. In that case the Court applied a reasoning similar to the one followed in *Zhu and Chen* to the situation of static young Union citizens and their father. The Court explicitly held that a refusal of a work permit to the father would infringe Union law because it would deprive him of the possibility to generate a sufficient income for himself and his family. It would seem to follow that a Member State may not forbid a primary carer to take up paid employment.

415 The corollary of this view is a rather narrow interpretation of the "primary carer" concept, which does not normally cover non-family members, for instance. See the discussion under IV.B., *supra*.

In conclusion, the UK's implementation of the primary carer concept is rather doubtful.[416] This is all the more the case after the recent judgments in *Ibrahim* and *Teixeira*, as will become clear in the following.

2. Implications of *Ibrahim* and *Teixeira*

The recent *Ibrahim* and *Teixeira* judgments have not (yet) led to any change in the general UK immigration rules or in the Immigration (European Economic Area) Regulations 2006.[417] As a consequence, the rights enjoyed by primary carers in the UK can no longer fully be determined on the basis of UK immigration rules, since the existing rules are, as was noted above, incompatible with *Ibrahim* and *Teixeira* on a number of points. Such is not unlike Directive 2004/38, which does not lay down residence rights for the primary carer either.[418] However, it would be in the interest of legal certainty and transparency that the residence rights for primary carers would be explicitly and clearly laid down in national legislation of the Member States, which are the primary responsible for applying Union free movement law and for pursuing a coherent immigration policy.

Interestingly, the UK legislator did change the national immigration provisions in the aftermath of the *Baumbast and R* case in order to bring them in line with that judgment. The Immigration (European Economic Area) (Amendment) Regulations 2003 amended the Immigration (European Economic Area) Regulations 2000, by adding two categories of privileged family members. It added the following paragraphs to Regulation 6 of the latter Regulations, which - employing a rather strange formulation - determined the persons who are privileged family members of another person:

> "(2A) If the other person has divorced his spouse, the person is his divorced spouse provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the United Kingdom.
> (2B) If the other person has ceased to be a qualified person on ceasing to reside in the United Kingdom, the persons are—
> (a)his spouse or his divorced spouse, provided she is the primary carer of their dependent child who is under 19 and attending an educational course in the United Kingdom; and
> (b)descendants of his or of his spouse who are under 21 or are their dependants, provided that they—
> (i)are attending an educational course in the United Kingdom;
> (ii)resided with him in the United Kingdom when he was a qualified person; and
> (iii)are not able to attend an equivalent educational course outside the United Kingdom"

---

416 See Fernandes, "The 'Chen' Cases (Case Comment)" (2007) 21 *J.I.A.N.L.*, 246, who argues that excluding the class of persons mentioned in paragraph 257C from the 2006 Regulations is incompatible with Directive 2004/38.

417 One could take the view that this is not surprising. It could be argued that the judgments were in the first place concerned with access to housing benefits and that they stand for the holding that even persons who do not qualify for residence under UK immigration rules could still be entitled, under certain circumstances, to claim social benefits. Still, it cannot realistically be disputed that the judgments were concerned with the residence rights enjoyed under Union law by primary carers of school-going children.

418 Except, arguably, in its Article 12.

These paragraphs exemplify the UK legislator's interpretation of the *Baumbast and R* judgment and provide a possible answer to some of the questions stated higher. However, the Immigration (European Economic Area) Regulations 2000 were repealed by the Immigration (European Economic Area) Regulations 2006, which implement Directive 2004/38 for the UK. The new Regulations no longer confer rights on the primary carer of children, presumably because the UK legislator was of the opinion that Directive 2004/38, which does not mention the primary carer either, exhaustively codified the residence rights enjoyed by family members of Union citizens. Since the provisions above are no longer in force, I will not further analyse them here. They would in any event have needed to be amended by new legislation in order to implement the *Ibrahim* and *Teixeira* judgments. No such legislation is in force at present, as was remarked higher.

It is more illuminating to look at recent documents issued by the UK Department for Work and Pensions to clarify the consequences of the *Ibrahim* and *Teixeira* judgments, namely a circular[419] and a memo[420] entitled "Right to Reside – Parent and Primary Carer of a Child in Education". These documents were issued to grant clarification to the UK authorities competent for granting social benefits such as the one at issue in the *Ibrahim* and *Teixeira* cases. Put differently, they are primarily concerned with the application of UK rules relating to certain social benefits, rather than with the residence rights of primary carers under Union law. Nevertheless, they necessarily clarify the latter issue since the eligibility for these benefits in the UK depends on it.

The said documents contain a number of criteria determining the scope of the right of residence enjoyed by school-going children and their primary carer. It is stated that a claimant will have a right of residence under Article 12 of Regulation 1612/68 if:

1. the claimant is the parent (or step parent) and primary carer of a child **and**
2. the claimant or the child's other parent is a citizen of another EEA State or Switzerland […] **and**
3. that person is working or has worked as an employed person in the UK […] **and**
4. there is a common period where that child was in general education in the UK whilst the migrant worker also lived in and was employed in the UK […] **and**
5. that child is still in general education in the UK and is under 18 […]

A number of interesting points ensue. First of all, according to the criteria, only the parent or stepparent of a child can be entitled to residence as the primary carer of that child. Second, only the primary carers of children of employed Union citizens qualify, to the exclusion of carers of children of self-employed or non-economically active Union citizens.[421] Third, it would seem that only one person can qualify as a primary carer under the criteria set out. Fourth, the fourth criterion indicates that a certain period of schooling of the child concerned must take place while the parent of the child is working.[422] Lastly, in order to qualify for the right of residence, the child concerned must be under eighteen years old.

---

419 Housing Benefit and Council Tax Benefit Circular HB/CTB A10/2010 of May 2010, *available at* www.dwp.gov.uk/docs/a10-2010.pdf.

420 Memo DMG 30/10 revised of December 2010 "Right to Reside – Parent and Primary Carer of a Child in Education", *available at* http://dwp.gov.uk/docs/m-30-10.pdf.

421 This is made explicit in para. 9 of Memo DMG 30/10 revised.

422 See also para. 12 of Memo DMG 30/10 revised.

As will be clear from my analysis above, the UK Department for Work and Pensions takes a rather literal and rather restrictive interpretation of the *Ibrahim* and *Teixeira* judgments. I may be wondered whether that department has not overly focused on the specific situation at hand in these cases, thereby overlooking the Court's *ratio decidendi*. This restrictive interpretation is, in my view, not easy to reconcile with the underlying justifications for the Court's holdings on a number of points. As I have explained higher, there are good arguments to make for not limiting the said case law to children of employed Union citizens and for accepting that residence rights can be enjoyed by multiple primary carers. I have also defended the view that the notion primary carer should not be given a restrictive interpretation and cannot be limited to parents or stepparents. In this connection, it can certainly not go unnoticed that the UK immigration rules, as modified after the *Zhu and Chen* case, contain a wider notion of "primary carer". The relation between the UK immigration rules and the department documents just discussed seems therefore ambiguous at best. I will come back to this point below.

The fifth criterion states that the child must be under eighteen at the moment of the claim for residence, although it is stated that the right of residence for the primary carer can, exceptionally, continue beyond the age of eighteen if the child continues to need the presence and care of that person in order to be able to complete his or her education.[423] This can probably be reconciled with a literal reading of the *Teixeira* judgment, in which the Court also stated that the right of residence does not necessarily *end* when the child attains the age of majority, which implies that the right of residence was obtained before that age was attained.[424] Still, it can be wondered whether Article 12 of Regulation 1612/68 cannot also be relied upon by children of a Union citizen who have already attained the age of majority (contrary to the fifth criterion above). Such would appear to accord better with the underlying justifications for the Court's decision[425] and with the Court's holding that Article 12 of Regulation 1612/68 must be given a broad interpretation.[426]

The fourth criterion set out above seems not fully in line with the *Ibrahim* and *Teixeira* judgments, for two reasons. In the first place, it seems to limit the enjoyment of a right of residence to the primary carer of children who have pursued education in the host Member State for a certain period of time.[427] No such durational requirement can be derived from the wording of the judgments in *Ibrahim* or *Teixeira* and the need for a certain period of schooling in order to derive rights from Article 12 of Regulation 1612/68 was explicitly rejected by AG Mazák.[428] Still, as I have argued above, a durational requirement could be defended in cases where the Union citizen

423 See para. 13 of Memo DMG 30/10 revised.

424 ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, paras 86-87.

425 More in particular, with the need to preserve the *effet utile* of the free movement provisions. Once it is accepted that children above the age of majority need their primary carer in order to exercise their right to access to education, it seems logical that children who, under such conditions, begin their education in the host Member State after having attained the age of majority, must be allowed to be joined by their primary carer. Holding differently would prejudice the *effet utile* of the rights of these children.

426 ECJ, Case C-413/99 *Baumbast and R* [2002] E.C.R. I-7091, para. 74.

427 The precise duration required does not appear from the criteria and will have to be determined by the UK authorities implementing them.

428 Opinion of AG Mazák in Case C-310/08 *Ibrahim* [2010] E.C.R. I-1065, para. 33.

concerned remains in the host Member State without satisfying the residence conditions of Directive 2004/38 and where the primary carer and the school-going children depend for their subsistence on the social assistance system of the host Member State.[429] In the second place, the fourth criterion requires that the Union citizen is, for a certain period of time, employed while his child pursues education.[430] The Court in *Teixeira* explicitly rejected the view that such was required, holding that Article 12 of Regulation 1612/68 confers a right of residence also on school-going children of former migrant worker and stating that "it is enough that the child who is in education in the host Member State became installed there when one of his or her parents was exercising rights of residence there as a migrant worker".[431] The fourth criterion set out above seems, therefore, to be in violation of Union law.

In sum, the interpretation by the UK Department for Work and Pensions of the Court's recent case law on the residence rights for primary carers of school-going children is conservative at best and more probably at variance with the Court's case law on some points. Future case law of the Union Courts or documents from the Union institutions will need to clarify a number of questions set out above, but it is highly likely that the information stated in the documents discussed will need to be changed in order to bring it in accordance with Union law.

Besides, it remains at the moment unclear what the relation is between these documents and the provisions on the residence rights of primary carers contained in paragraphs 257C-257E. So far the UK authorities appear to treat *Zhu and Chen* like situations completely separate from the situations exposed in the *Baumbast and R* lines of cases. The problem is that paragraphs 257C-257E are broad in wording and seem to capture both types of situations. Applied to a situation where the residence right of the primary carer of a school-going child of a (former) migrant worker in the host Member State is at stake, these paragraphs seem in conflict with the Court's recent case law in that they make the right of residence of the primary carer subject to the classic residence conditions of Directive 2004/38, in that they preclude the primary carer from taking up employment in the host Member State and in that they limit the right of residence to primary carers of children under eighteen. However, as I have argued above, it is possible for Member States to provide for more generous residence rights specifically for school-going children and their primary carer. Accordingly, it would be possible to have a "special regime" for school-going children, which is more generous. Still then, the current legislative provisions in the UK do not themselves make any provision for such more favourable treatment. This is apt to lead to confusion and is detrimental to legal certainty. Besides, as I have remarked higher, the residence right accorded tot the primary carer of school-going children in the UK seems at present more narrow than that accorded to the primary carer of non school-going children in one respect, namely that the former is only enjoyed by parents and stepparents.

It can be concluded that the present situation in the UK is problematic in that no clear and unambiguous legislative provisions are in place relating to the residence rights

429 See the discussion , under IV.B.2.a., *supra*.

430 Memo DMG 30/10 revised refers, in support of this criterion, to a recent decision of Commissioner Judge Jacobs: *S of S for W & P v JS* (IS) [2010] UKUT 347 (AAC).

431 ECJ, Case C-480/08 *Teixeira* [2010] E.C.R. I-1107, paras 72-74.

enjoyed by primary carers and that the provisions and criteria in place seem to be in conflict with Union law on a number of points.

D. Conclusion

The foregoing discussion showed how the ECJ has, in a number of fairly recent cases, recognised a right of residence for the parent who is the primary carer of his or her EU children,[432] despite the fact that the condition of dependency was not fulfilled. Accordingly, the ECJ, in the circumstances of these cases has created a new category of privileged ascendants, namely one that is in a relation of "care" with the primary beneficiary of the free movement rights, rather than in a relation of dependency, as is required by secondary Union legislation. As I have explained, this holding can be based on two justifications, namely the need to preserve the *effet utile* of the free movement provisions, on the one hand, and the need to interpret the free movement provisions in accordance with fundamental rights, on the other hand. These considerations justify an extension to the primary carer of a right of residence in the host Member State which is a derivative right of the right of residence enjoyed by his or her children.

At the same time, it must be remarked that the precise scope of this case law remains at present rather difficult to determine. It is not clear exactly what categories of children must be considered entitled to be joined by their primary carer in the host Member State and what the (family) relationship must be between the primary carer and the children concerned in order to be covered by the principles underlying the case law discussed. As far as children are concerned, I have argued that children of all categories of Union citizens should qualify, regardless of the economic activity of their parents, and that school-going children have a stronger claim for residence, which results in more extensive rights for the primary carer of such children. As far as the primary carer is concerned, I have advocated that not only parents, but also other family members belonging to the core family of the child concerned should be entitled to claim a right of residence as the primary carer of that child. These categories of persons should be given a broad interpretation, in line with the justifications mentioned above. Accordingly, stepparents, adoptive parents and the registered partner of a parent are covered by the said principles. Exceptionally, the same can apply with regard to siblings. Non-family members such as foster parents or legal guardians will not be covered, unless, exceptionally, such would be required by Article 8 ECHR. Besides, it is also possible in my view that multiple persons qualify as the primary carer of a child and derive a right of residence from that status. In any event, Member States remain free to confer more far-reaching rights on primary carers than is required by Union law.

The present uncertainties as to the scope of the case law dealing with residence rights of primary carers make it rather difficult for the Member States to give a proper implementation of Union free movement law by incorporating the said case law into their national legislation and for the competent Member State authorities to apply Union free movement law in accordance with the case law of the Courts. This is clear

[432] The case law discussed in fact concerns children who either are Union citizens themselves or are the sons or daughters of a Union citizen. In this chapter, I have focussed on the first situation.

from the discussion above of the situation in the UK, the Member State whose legislation gave rise to all the cases discussed in which the Court explicitly or implicitly recognised a right of residence for primary carers. Neither the present UK immigration rules nor the guidance given by the competent UK Ministry seem to fully capture, in my view, the importance and scope of the case law discussed.

It is to be hoped that future case law will further clarify the scope of the free movement rights enjoyed by primary carers of children in the host Member States by giving a clear answer to the questions raised above. In this connection, it is important that the Court bases its case law to the fullest extent possible on secondary Union legislation in order not to overstep its constitutional role and to give due weight to the interests at stake for the Member States. Accordingly, while in certain circumstances the Court may justifiably leave unapplied restrictive conditions found in secondary Union legislation surrounding the residence rights of certain categories of family members, it cannot add new categories of privileged family members against the apparent will of the Union legislator.

Another option for clarification would be an intervention by the Union legislator itself. Accordingly, Article 2 of Directive 2004/38 could be amended and a new category of privileged family members could be added, namely the primary carer. The Union legislator could use this opportunity to clarify a number of the questions raised above by carefully defining this category of family members. The definition could clarify, *inter alia*, what categories of children would have the right to be joined by their primary carer, the relation required between a child and his or her primary carer and whether multiple primary cars could qualify as the privileged family member of a Union citizen. The Union legislator could also opt to amend Article 12(3) of Directive 2004/38. Thereby it could enlarge the wording of that Article in order to make it applicable not only in the case of death or departure of the Union citizen, but also where the latter continues to reside in the host Member State after no longer satisfying the conditions for such residence.[433] At the same time, it could opt to change the definition of primary carer contained in that Article. These changes would be apt to clarify and incorporate the Court's recent *Ibrahim* and *Teixeira* cases and would, in fact, render that case law applicable to school-going children of all categories of Union citizens who initially derived a right of residence as family member of those citizens.[434]

The bottom-line is that "care" is an element which does not figure in current Union free movement legislation, but which should in certain circumstances be taken into account in order to guarantee the *effet utile* of the free movement provisions and to give due respect to the right to respect for family life. At the same time it must be emphasised that, when taking this element into account in order to recognise a right of residence for the primary carer of a Union citizen, sufficient attention should be paid to the financial interests of the Member States. Accordingly, it would be important for the category of primary carer to be defined with precision in the case law of the

---

433 The special circumstances of "divorce, annulment of marriage or termination of registered partnership" are already regulated separately in Article 13 of Directive 2004/38 and would presumably continue to fall under that Article.

434 Merely amending Article 12(3) of Directive 2004/38 would not, however, incorporate the Court's case law on the residence rights of the primary carer of non school-going children (case *Zhu and Chen*, in particular).

Courts or even in Union legislation in order to make it possible for Member States to put clear limitations on the categories of persons they grant a right of residence on account of their capacity as the primary carer of a child entitled to reside in their territory. Besides, the right of residence of the primary carer could in normal circumstances be made subject to the general conditions of Directive 2004/38, which are in part aimed at safeguarding the financial interests of the Member States. The only exception would be the residence right of the primary carer of school-going children, which cannot be made subject to the classic residence conditions. With regard to this category of primary carers, Member States should be allowed some scope to tackle abuses of rights and to restrict, under certain circumstances, the said right of residence to the primary carer of school-going children who are sufficiently integrated in their society.

V CONCLUSION

One of the fundamental aspects of the free movement of Union citizens is that Union citizens have the right to be joined or accompanied in the host Member State by close family members, as defined in secondary Union legislation. The grant of residence rights to family members is commonly explained by the need to abolish obstacles to the exercise of free movement rights by Union citizens and by the need to comply with the fundamental right to respect for family life. At the same time, it is clear that the conferral by the Union of residence rights on family members can have a great impact on the immigration policies of the Member States and can have important financial consequences for them. Precisely to limit this impact and these consequences, the Union legislator has surrounded the residence rights of family members of Union citizens with restrictive conditions.

The question I have tried to answer in this chapter is whether the Union strikes a proper balance between, on the one hand, guaranteeing the effective free movement of Union citizens and, on the other hand, the interests of the Member States. I have focused on the residence rights of ascendants of Union citizens and the specific conditions surrounding these rights. My discussion was centred on three contentious issues.

In the first place, and least importantly, the meaning of the notion “direct relatives in the ascending line” employed by Directive 2004/38 is far from clear. In particular, the qualification “direct”, which is employed by Directive 2004/38 for the first time in this context, has given rise to controversies in legal literature and diverging interpretations by authorities of different Member States. I have argued that the notion “direct relatives in the ascending line” must probably be understood as meaning that only ascendants with legal ties to the Union citizen and/or his spouse or partner qualify. Such would do justice to the underlying justifications for granting residence rights to ascendants and be in accordance with the apparent will of the Union legislator. The addition of the term “direct” does not, however, add much in this interpretation. Future case law or guidance from the Union institutions should clarify this matter in the interest of legal certainty.

In the second place, I have analysed the precise meaning of the condition of dependency, since only dependent ascendants enjoy a right of residence under the

Union free movement provisions. My conclusion is that the condition of dependency as it is currently interpreted does not strike a proper balance between the financial interests of the Member States and the need to guarantee the effective free movement of Union citizens and their family members. On the one hand, the ECJ's interpretation of dependency as relating to financial dependency only, while in line with the wording of Directive 2004/38, is hard to square with the need to remove obstacles to the exercise of free movement rights and with the need to comply with the right to respect for family life. On the other hand, by refusing to inquire into the underlying reasons for dependency, the ECJ fails to give sufficient weight to the financial interests of the Member States. In addition, even after the clarifications brought about by recent ECJ case law, it remains a vague notion, difficult to implement by the Member States. It may be preferable to drop the condition of dependency altogether, since it is not fully in line with the underlying justifications for granting a right to ascendants, difficult to implement and not needed in order to safeguard the financial interests of the Member States.

In the third place, and most importantly, I have analysed recent case law in which the ECJ has recognised a right of residence in favour of the primary carer of EU children,[435] despite the fact that the condition of dependency was not satisfied. I have concluded that the ECJ was right in the circumstances of the cases discussed to leave the condition of dependency unapplied, even though that condition figures in secondary Union legislation and even though this will remain the case for the foreseeable future. I have argued, moreover, that the reasoning of the Court should apply more generally and that primary carers should, if certain conditions are fulfilled, be entitled to reside in the host Member States together with the children they are caring for. The precise scope of such residence right remains open for debate. On the basis of the justifications for granting rights to family members, I have argued that only family members belonging to the core family of a child should be entitled to claim a right of residence as the primary carer of that child and that, while primary carers of children of all categories of Union citizens should possibly qualify, primary carers of school-going children enjoy more extensive residence rights in the host Member State. At the same time, Member States should be given the possibility to safeguard their financial interests, *inter alia*, by ending abuses of the said residence rights and by restricting, under certain conditions, these residence rights to the primary carer of school-going children who are sufficiently integrated in their society. While the extension of residence rights to primary carers is a welcome evolution, the present situation is riddled with uncertainties, which makes it very difficult for Member States to give a sensible implementation to this evolution, as was illustrated by a detailed study of the UK rules. Future case law or even an amendment of Union legislation should clarify the matter in the interest of legal certainty.

The bottom-line is that the Union, in conferring a right of residence on ascendants of Union citizens, generally speaking does a good job at reconciling the interests of Union citizens and those of the Member States. Residence rights enjoyed by Union citizens and their ascendants inevitably have an important impact on the immigration policies and public finances of the Member States, but a number of mechanisms are in place in order to keep this impact within bounds. However, as the foregoing

[435] The case law discussed in this chapter concerns children who either are Union citizens themselves or are the sons or daughters of a Union citizen. For my analysis in this chapter, I have focussed on the first situation.

demonstrates, on a number of points the balance is unjustifiably tilted in favour of the interests of either the Union citizens and their family members or the Member States. This is in no small part due to the existing vagueness and uncertainties regarding these points, which make it difficult for the Member States to give a sensible implementation to the residence rights enjoyed by ascendants of Union citizens and for Union citizens and their family members to ascertain the precise scope of their rights. Future case law, Union legislation or guidance by Union institutions is needed to bring clarification on these points. In this connection, it must be emphasised that striking the balance between the competing interests at stake is a dynamic process, which involves a constant interplay between the Court of Justice and the political Union institutions. This is exemplified by the recent line of cases in which the Court left unapplied certain restrictive conditions of secondary Union law surrounding the residence rights of ascendants of Union citizens in favour of primary carers of EU children. It is to be hoped that this recent evolution, which strikes a better balance between the competing interests than the current Union legislation does, will be further clarified and consolidated.

CONCLUSION

CHAPTER 6 CONCLUSION

"If the people were given the chance, enlightened by the great ideals of the project under construction, they would opt for a democratic, federal Europe. It is the outdated, vestigial attachment to nations that stands as a screen between the citizens and their rightful European inheritance."[1]

"Si l'on veut que l'Union gagne la fidélité des citoyens, il faut qu'elle soit une union intellectuelle et affective. L'Europe a besoin d'une 'âme', un sentiment diffus qui nous permette de nous reconnaître dans une identité commune et dans un destin commun."[2]

"L'Europe n'est plus qu'une nation composée de plusieurs."[3]

I GENERAL FINDINGS

This Ph.D. dissertation examined, from a legal perspective, the extent to which the provisions on Union citizenship can bring an actual contribution to the European integration process. The analysis was firmly situated against the background of an inherent tension between the potential contribution of Union citizenship to European integration, on the one hand, and its impact on certain key policies and competences of the Member States, on the other hand. I have focussed my research on two crucial aspects of Union citizenship, namely the personal scope of Union citizenship and the free movement of Union citizens.

The main finding of my analysis is that the provisions on Union citizenship have a real impact on the Member States' competences in important fields such as nationality, immigration or policies with regard to the OCTs. They oblige the Member States in these fields to take account of the consequences of their policies for the enjoyment of Union citizenship rights and thereby induce them to adopt a more "inclusive" approach towards Union citizens. As such, the Union citizenship concept does bring a real and tangible contribution to the European integration process. This contribution inevitably restricts the Member States' competence in the said fields to some extent. Still, as my analysis has consistently shown, the Union legal framework provides adequate safeguards for the Member States to protect their key interests. Accordingly, the provisions on Union citizenship do not change the fact, for instance, that the Member States remain the ultimate responsible for regulating the said competence fields. Besides, the Member States may rely on overarching interests to justify national measures even if they restrict the effects of Union citizenship.

The bottom-line is that Union law at present provides a rather satisfactory balance between safeguarding and further developing the *effet utile* of Union citizenship, on the one hand, and safeguarding the interests of the Member States, on the other hand. At the same time, it must

---

1 LSE Mackinder Programme *Another Europe? After the third no* (Dublin, The Lilliput Press, 2008), 22.

2 Prodi, "La richesse de la diversité : la force de l'Union" (Speech of 9 November 2001 in Innsbruck), cited by Jouen and Chambon, L'identité européenne dans les textes et les politiques communautaires, (2006) *Notre Europe, available at* http://www.notre-europe.eu/fr/axes/visions-deurope/travaux/publication/lidentite-europeenne-dans-les-textes-et-les-politiques-communautaires/.

3 Montesquieu, *Réflexions sur la Monarchie universelle en Europe* (1734), cited by Maas, *Creating European Citizens* (Lanham, Rowman & Littlefield, 2007), 115.

be emphasised that there is considerable room for improvement. On a number of points, the provisions on Union citizenship, at least under their current interpretation, appear to embrace approaches which are outdated or ambiguous at best. Besides, some provisions are riddled with uncertainties. A clearer legal framework, which more consistently takes into account the paramount importance of Union citizenship as the fundamental status of the nationals of the Member States, would assist the Member States in implementing the Union citizenship provisions and the Union citizens in ascertaining their rights. Besides, the embracement of well-funded, more explicit and more transparent justifications accompanying the continuous development of Union citizenship would enhance its legitimacy. It would, moreover, be apt to more clearly determine the scope of the impact of the Union citizenship concept and thereby presumably diminish the reluctance on part of certain Member States to fully accept its consequences.

It can be expected that the future will see a progressive development of the Union citizenship concept and a further enhancement of its contribution to European integration. The main responsible for this will likely be the Court of Justice. Indeed, the gradual development of Union citizenship has in the past happened first and foremost through the dynamic case law in the field. Already during the time my Ph.D. research was carried out a number of judgments have been rendered relating to both aspects of Union citizenship under consideration which will no doubt go down in history as landmark judgments. In cases like *Rottmann* or *Ruiz Zambrano* the Court was prepared to radically break with previously accepted *status quos* and to adopt new solutions which more satisfactorily reconcile the effectiveness of Union citizenship and the interests of the Member States. It is to be expected that this development will continue and that future case law will further pave the way for a more effective and balanced Union citizenship concept. At the same time it must be pointed out that the Court's role in the development of Union citizenship is necessarily limited. A legitimate and effective development of Union citizenship requires fruitful interaction between judicial and political Union institutions and constructive input from the Member States. At the end of the day, only that can guarantee an effective Union citizenship with a potent integrating role.

In what follows I will present the main conclusions of Part I of the dissertation, concerning the personal scope of Union citizenship and Part II of the dissertation, concerning the right to free movement of Union citizens.

II PART I PERSONAL SCOPE OF UNION CITIZENSHIP

Part I of the dissertation discussed the personal scope of Union citizenship by tackling a number of fundamental questions. On a more general level, it provided an answer to the question of who is a Union citizen and who is not. More important was the related question of who is competent to lay down the rules governing the conferral and loss of Union citizenship, namely the Union or the Member States. This, in turn, allowed an analysis of the extent to which the application of the rules governing the personal scope of Union citizenship has an impact on the competences and policies of the Member States and thus the extent to which Union citizenship can be a real factor of European integration.

Chapter 2 analysed the legal regime surrounding the determination of the personal scope of Union citizenship. The main conclusion of the Chapter is that, while the Member States are competent to determine the personal scope of Union citizenship on ground of their competence to regulate Member State nationality, they do not enjoy unrestricted freedom in

this regard. Through the concept of Union citizenship, Union law impacts on the Member States' competence to regulate nationality in two ways, namely in a direct and in an indirect way.

In the first place, Union law indirectly influences the competence of the Member States in the field of nationality. The coupling of Member State nationality and Union citizenship, together with the duty for Member States to unconditionally recognize decisions regarding nationality taken by another Member State, sets in motion a subtle interplay between the Member States, whereby rules and practices regarding nationality in one Member State may have significant consequences for other Member States. This may lead to political pressure on certain Member States to change their nationality rules with regard to loss or acquisition of nationality. The clearest example of such change until now is the change of the Irish nationality legislation in 2004. Similar mechanisms of indirect pressure by the Member States and the Union institutions may well lead to changes in the near future in the nationality laws and practices of Spain, on the one hand, and Estonia and Latvia, on the other hand.

In the second place, Union law also puts direct limitations to the Member States' competence regarding nationality. Indeed, the Member States have to exercise this competence with due regard to Union law to the extent that it impacts on Union citizenship, as was confirmed by the Court in its seminal *Rottmann* judgment of 2 March 2010. Accordingly, every rule or decision concerning acquisition, refusal or loss of Member State nationality must, arguably, be in accordance with Union law where it entails the acquisition, refusal or loss of Union citizenship – even in the absence of any cross-border dimension. The precise scope of the duty to have due regard to Union law is at present difficult to ascertain. It seems that five Union law rules or principles, in particular, could act as meaningful limitations to the competence of the Member States regarding the adoption and implementation of rules concerning nationality. The principle of proportionality is the only limitation until now which has as such been recognised by the ECJ. Other rules or principles of Union law that could be relevant in this regard are the right to free movement of Union citizens, the duty to respect fundamental rights, the principle of sincere cooperation and the principle of legitimate expectations. The consequence of the existence of these limitations is that Member States are required to take them into account when laying down rules on acquisition and loss of nationality and when implementing these rules. Where a Member State adopts a measure that violates one or more of the said limitations, the measure concerned will be fully effective under Union law and any resulting acquisition, refusal or loss of Union citizenship will have to be fully accepted by the other Member States. At the same time, the Member State concerned will be under a duty to bring its legislation or practice in accordance with Union law – possibly with retroactive effect - and, where necessary, this duty can be enforced before the Union Courts.

The bottom-line is that the determination of the personal scope of Union citizenship hinges on a delicate balance between conflicting interests. On the one hand, it is of capital importance that the Union recognizes the principled competence of the Member State to regulate nationality and that the application of the provisions on Union citizenship does not encroach upon this competence. Such is required for the Union in order to respect the national identities of the Member States, a duty now explicitly enshrined in the Treaties. On the other hand, the effectiveness of Union citizenship and the rights attached to it must be guaranteed, and it is of paramount importance therefore that its personal scope is determined in accordance with certain fundamental principles of Union law. Union citizenship, as the most fundamental status of Member State nationals, could not be effective if its conferral and

withdrawal were completely at the disposal of the Member States. The present Union legal framework adequately reconciles these fundamental interests, by leaving the determination of the personal scope of Union citizenship to the Member States, but at the same time requiring them to respect certain principles of Union law. Still, it must be acknowledged that there is a real need for clarification with regard to the precise scope of the Member States' duties in this connection. In particular, it must be clarified what exigencies flow from the principle of sincere cooperation in this context and to what extent the Member States are required to coordinate their nationality policies in order to avoid consequences damaging for the effectiveness and legitimacy of Union citizenship. ECJ case law and, perhaps, non-binding Union law instruments have a pivotal role to play in this regard.

In order to avoid some of the problems associated with the current legal framework, it may be envisaged that in the future the Union will be given direct competence to regulate the personal scope of Union citizenship. On the one hand, the Union legislator could be given competence to adopt minimum rules on the acquisition and loss of Member State nationality, with a partial harmonisation of the Member States' nationality rules as a result. On the other hand, it would be possible to partially or entirely decouple Union citizenship and Member State nationality and establish a self-standing concept of Union citizenship. Both options would bolster the status of Union citizenship and enhance its contribution to the European integration process, in particular with regard to long-term resident third country nationals in the Member States. At the same time, both options would radically diminish the competences of the Member States with regard to the determination of Union citizenship and probably reduce the importance of Member State nationality as a legal status. It is unlikely therefore that the said options, which would require a substantive amendment of the Treaty provisions on Union citizenship in accordance with the constitutional requirements of the Member States, will come about in the near future.

Chapter 3 analysed the specific situation of the Overseas Countries and Territories (OCTs) associated with the Union from the viewpoint of Union citizenship. The main finding, after studying both the constitutional structure and the nationality laws of the Member States concerned and the Union legal framework regarding the OCTs, is that those citizens resident in the OCTs who have the nationality of one of the Member States are full-blown Union citizens, unless that Member State submits a declaration providing differently. At present, all Danish, Dutch and French nationals and most British nationals living in the OCTs are Union citizens therefore. Hence, they fully enjoy all rights attached to that status. However, as far as the enjoyment of these rights is concerned, most OCT nationals find themselves in a somewhat peculiar situation. The reason is that it is traditionally accepted that only limited parts of the Treaties apply to the OCTs and that the Union citizenship provisions are not, in principle, among them. The consequence of this traditional view is that OCT nationals cannot normally invoke their citizenship rights in the OCTs, because the latter are outside the geographical scope of application of the provisions embodying these rights. However, there are strong arguments for doing away with the said traditional assumption and holding that the provisions on Union citizenship apply to the OCTs, at least partially. This seems necessary to guarantee the full effectiveness of the provisions on Union citizenship, but also to protect and enhance the association between the Union and the OCTs. Accordingly, there a strong arguments in favour of applying Article 21 TFEU to travels between the OCTs and the European territory of the Member States and in favour of the view that the electoral rights enjoyed by Union citizens must be enjoyed by OCT nationals to the fullest extent possible.

Consequently, the provisions on Union citizenship have a capital role to play in the integration of the OCTs and their residents in the European Union. These provisions entitle OCT nationals to important rights which are apt to further the connection between them and the Union, such as, in particular, the right to participate in elections to the European Parliament, a body with important decision-making powers in relation to them. As such, these provisions have the beneficial effect of obliging the Member States to change their policies with regard to the OCTs to a more "inclusive" one, thereby strengthening the ties with their distant overseas nationals and further integrating them in the European construction. This is perfectly illustrated by the recent changes in the Netherlands electoral laws, extending the right to participate in European Parliamentary elections to Dutch OCT nationals, and recent changes in British nationality laws, extending Union citizenship and the associated rights to almost all British overseas citizens. Both changes were arguably induced by the provisions on Union citizenship. At the same time, the provisions on Union citizenship make a significant contribution to the close association that exists between the Union and the OCTs and to some of its most important purposes, such as furthering the interests and prosperity of the inhabitants of the OCTs.

Still it must be remarked that the current policies of the four Member States possessing OCTs are not yet fully in line with the consequences flowing from the provisions on Union citizenship. The continuing exclusion, for instance, of (categories of) Union citizens resident in the Danish, Dutch and UK OCTs from the right to participate in European Parliamentary elections is no longer defensible in the light of these provisions. It is to be hoped that the near future will see a further tendency towards more inclusion of OCT nationals and a full recognition of their Union citizenship status and the rights attached to it. This tendency will likely be given a strong impetus by the implementation of the new partnership with the OCTs proposed by the Commission, which will be characterised by increased reciprocity and greater applicability of the Union *acquis*. It would also gain strength with an explicit rejection by the Union Courts of the traditional view regarding the non-applicability of the Union citizenship provisions in the OCTs.

III PART II FREE MOVEMENT OF UNION CITIZENS

Part II of the dissertation analysed the right of free movement and residence of Union citizens and their family members, focussing on the right for Union citizens to be joined or accompanied by non-EU family members. It examined how and to what extent the requirements deriving from the implementation of this right can be reconciled with the legitimate interest of the Member States in adopting and maintaining an effective immigration policy.

The main conclusion of *Chapter 4* is that the provisions on the free movement of Union citizens and their family members are given a broad interpretation. As a consequence, the influence exerted by Union law, through the provisions on Union citizenship, on the immigration policies and competences of the Member States is considerable. Member States have only little scope to apply their immigration laws to non-EU family members of a Union citizen who moves or has moved between Member States. Moreover, it appears that the same legal regime has recently been extended, under certain circumstances, to non-EU family members of a Union citizen who has never moved, *i.e.* to situations which were traditionally considered to be "purely internal" from the viewpoint of Union law. This extension is in full development and its scope and underlying justifications are at present far from clear. It seems

defensible to limit it to situations where a Union citizen is confronted with a national measure *de iure* or *de facto* annihilating his Union citizenship and, possibly, to certain cases of fundamental rights violations.

This broad interpretation of the free movement provisions is justified. A more narrow interpretation would see the emergence of important obstacles to the effective free movement of Union citizens on the territory of the Member States and would not be apt to adequately safeguard the Union's fundamental rights standards. Given the significant contribution of free movement to the completion of a Citizens' Europe, that would significantly reduce the possible contribution of Union citizenship to European integration. At the same time, it must be pointed out that that the broad interpretation far from extinguishes the possibility for the Member States to pursue an effective immigration policy. First of all, its consequences are limited *ratione personae* in that only certain categories of family members of Union citizens are affected, and only to the extent that the conditions of Directive 2004/38 are satisfied. Moreover, Member States have the power to protect their key interests, since they are still allowed to restrict the free movement rights of family members of a Union citizen on grounds or public policy, public security or public health or in case of abuse or fraud.

Still, it cannot be denied that the current legal framework surrounding Union citizenship and the right relating to family reunification in particular, suffers from a certain degree of *schizophrenia*. On the one hand, this legal framework is centred on the promotion of free movement between Member States and is therefore axed on a requirement of a cross-border dimension. On the other hand, there is a tendency to reduce the relevance of the element of movement in favour of the inclusion of static Union citizens and their family members. In this connection, a clear choice will have to be made between two options. The first option is to take the promotion of free movement of Union citizens, and its inherent contribution to the aims of a Citizens' Europe as a focal point. The consequence is to exclude static Union citizens from the benefit of family reunification under Union law, except, perhaps, where overarching interests such as fundamental rights or the need to preserve an individual's Union citizenship and the enjoyment of the associated rights are at stake. This option requires a more consistent and meaningful application of the cross-border requirement than what results from the present case law.

The second option is to discard free movement as the unique focal point for family reunification rights and to extend the benefit of family reunification to static Union citizens. This option would put an end to the current possibilities of reverse discrimination on this point and would significantly increase the fundamental rights protection available to static Union citizens. By offering enhanced guarantees for equality and fundamental rights protection, Union citizenship would certainly offer a more significant contribution to the European integration process than under the first option, because it would end the often denounced anomaly that Union citizens only become Union citizens when they leave their own Member State.[4] At the same time, it would radically transform the legal framework surrounding Union citizenship and radically alter the division of competences between the Union and its Member States. For this reason, the second option could arguably not legitimately be implemented by the ECJ alone, but would require an intervention by the Union legislator. Given the apparent reluctance of the Member States towards accepting the full impact of the Union citizenship provisions on their immigration policies and

[4] Toner, "Judicial Interpretation of European Union Citizenship - Consolidation or Transformation" (2000) 7 *MJ*, 170.

competences, the second option does not appear to be one that will be fully embraced in the near future.

The analysis in *Chapter 5* focused on the specific issue of the free movement and residence rights enjoyed by ascendants of Union citizens and the restrictive conditions surrounding these rights. The study of this specific subject functioned as a case study, which allowed me to formulate an answer to a more fundamental underlying question, namely whether Union law strikes a proper balance between, on the one hand, guaranteeing the effective free movement of Union citizens and their family members and, on the other hand, the interests of the Member States.

The general conclusion is that the Union, in conferring a right of residence on ascendants of Union citizens, generally speaking does a good job at reconciling the interests of Union citizens and those of the Member States. Residence rights enjoyed by Union citizens and their ascendants inevitably have an important impact on the immigration policies and public finances of the Member States, but a number of mechanisms are in place in order to keep this impact within bounds. However, on a number of points there is scope for improvement. This is in no small part due to the existing vagueness and uncertainties with regard to the conditions surrounding the residence rights enjoyed by ascendants of Union citizens, which make it difficult for the Member States to give a sensible implementation to these rights and for Union citizens and their family members to ascertain the precise scope of their rights.

In the first place, and least importantly, the meaning of the notion "direct relatives in the ascending line" stated in Directive 2004/38 is far from clear. In particular, the qualification "direct", which is employed by Directive 2004/38 for the first time in this context, has given rise to controversies in legal literature and diverging interpretations by authorities from different Member States. I have argued that the notion "direct relatives in the ascending line" must probably be understood as meaning that only ascendants with legal ties to the Union citizen and/or his spouse or partner qualify. Such would do justice to the underlying justifications for granting residence rights to ascendants and be in accordance with the apparent will of the Union legislator. The addition of the term "direct" does not, however, add much in this interpretation. Future case law or guidance from the Union institutions should clarify this matter in the interest of legal certainty.

In the second place, it is highly problematic that secondary Union legislation confers residence rights on "dependent" ascendants of Union citizens only. The condition of dependency, as it is currently interpreted, does not strike a proper balance between the financial interests of the Member States and the need to guarantee the effective free movement of Union citizens and their family members. On the one hand, the ECJ's interpretation of dependency as relating to financial dependency only, while in line with the wording of Directive 2004/38, is hard to square with the need to remove obstacles to the exercise of free movement rights and with the need to comply with the right to respect for family life. On the other hand, by refusing to inquire into the underlying reasons for dependency, the ECJ fails to give sufficient weight to the financial interests of the Member States. In addition, even after the clarifications brought about by recent ECJ case law, it remains a vague notion, difficult to implement by the Member States. It may be preferable in the future to drop the condition of dependency altogether, since it is not fully in line with the underlying justifications for granting a right to ascendants, difficult to implement and not needed in order to safeguard the financial interests of the Member States, given the fact that

those interests are adequately protected by other conditions surrounding the residence rights enjoyed by ascendants of a Union citizen.

Interestingly, the ECJ appears to have acknowledged to some extent the problematic character of the dependency condition, since it has been prepared in a number of recent cases to recognise a right of residence in favour of the primary carer of Union citizens, even where the condition of dependency was not satisfied. This exemplifies the fact that striking an appropriate balance between the competing interests at stake is a dynamic process which involves a constant interplay between the Court of Justice and the political Union institutions. The extension of residence rights in favour of primary carers of Union citizens should be further clarified and consolidated. In this connection, it is recommended to restrict the possibility to claim a residence right as the primary carer of a Union citizen to family members belonging to the core family of that citizen, except where overarching interests such as the need to comply with fundamental rights require otherwise. Moreover, while primary carers of children of all categories of Union citizens should possibly qualify, primary carers of school-going children should enjoy more extensive residence rights in the host Member State. At the same time, Member States should be given the possibility to safeguard their financial interests, *inter alia*, by combating abuses of the said residence rights and by restricting, under certain conditions, these residence rights to primary carers of school-going children who are sufficiently integrated in their society.

BIBLIOGRAPHY

Books

Aleinikoff and Klusmeyer, *Citizenship Today: Global Perspectives and Practices* (Washington D.C., Carnegie endowment for international peace, 2001), 410 pp.

Alston, Bustelo and Heenan (eds.), *The EU and Human Rights* (London, Oxford University Press, 1999), 917 pp.

Arai-Takahashi and Crawford, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp-Oxford-Portland, Intersentia, 2002), 300 pp.

Barnard, *The Substantive Law of the EU: the Four Freedoms* (2nd ed.) (Oxford, Oxford University Press, 2007), 643 pp.

Bauböck, Ersbøll, Groenendijk and Waldrauch, *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses* (Amsterdam, Amsterdam University Press, 2006), 588 pp.

Bossuyt and Wouters, *Grondlijnen van internationaal recht* (Antwerp, Intersentia, 2005), 1086 pp.

Bröring, Kochenov, Hoogers and Jans, *Schurende rechtsordes; Over de Europese Unie, het Koninkrijk en zijn Caribische gebieden* (Groningen, Europa Law Publishing, 2008), 333 pp.

Brownlie, *Principles of Public International Law* (7th ed.) (Oxford, Oxford University Press, 2008), 784 pp.

Burrows and Greaves, *The Advocate General and EC Law* (Oxford, Oxford University Press, 2007), 317 pp.

Carlier and Guild, *L'avenir de la libre-circulation des personnes dans l'U.E.* (Brussels, Bruylant, 2006), 322 pp.

Chalmers, Davies and Monti, *European Union Law: Cases and Materials* (2nd ed.) (Cambridge, Cambridge University Press, 2010), 1150 pp.

Clayton, *Textbook on Immigration and Asylum Law* (3rd ed.) (Oxford, Oxford University Press, 2008), 638 pp.

Clergerie, Gruber and Rambaud, *L'Union européenne* (8th ed.) (Paris, Dalloz, 2010), 928 pp.

Cornu and Association Henri Capitant, *Vocabulaire juridique* (8 ed.) (Paris, PUF, 2007), 986 pp.

Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2006), 888 pp.

Craig and De Búrca, *EU law. Text, Cases, and Materials* (4th ed.) (Oxford, Oxford University Press, 2007), 1148 pp.

Craig and De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), 824 pp.

Craig and De Búrca (eds.), *The Evolution of EU Law* (2nd ed.) (Oxford, Oxford University Press,

2011), 990 pp.

Crauwels and Joppen, *Lokale besturen en vreemdelingen: Een praktijkgericht handboek voor alle lokale besturen* (Brussels, Politeia, 2007), [looseleaf]

Dashwood, Dougan, Rodger, Spaventa and Wyatt (eds.), *Wyatt and Dashwood's European Union Law* (6th ed.) (Oxford and Portland, Hart Publishing, 2011), 1044 pp.

De Búrca (ed.), *EU Law and the Welfare State: in Search of Solidarity* (Oxford, Oxford University Press, 2005), 250 pp.

De Geest, De Ridder and Hobin, *Administratieve wegwijzer voor vreemdelingen, vluchtelingen en migranten* (Deurne, Kluwer, 1989), [loose-leaf]

De Groot, *Handboek nieuw nationaliteitsrecht* (Deventer, Kluwer, 2003), 588 pp.

Dehousse, Garcia Martines, Thiry and Volpi, *Droit international public, Tome II: Les acteurs de la société internationale* (Liège, Editions de l'Université de Liège, 2005), 180 pp.

Dirix, Tilleman and Van Orshoven (eds.), *De Valks Juridisch woordenboek* (3rd ed.) (Antwerp, Intersentia, 2010), 621 pp.

Dollat, *La citoyenneté européenne: théorie et statuts* (Brussels, Bruylant, 2008), 698 pp.

Faberon and Ziller, *Droit des collectivités d'outre-mer* (Paris, LGDJ, 2007), 546 pp.

Fransman, *Fransman's British Nationality Law* (2nd ed.) (London, Edinburgh & Dublin, Butterworths, 1998), 1251 pp.

Fransman, *Fransman's British Nationality Law* (3rd ed.) (Haywards Heath, Bloomsbury Professional, 2011), 1853 pp.

Garner (ed.), *Black's Law Dictionary* (9th ed.) (St. Paul, Thomson West, 2009), 1940 pp.

Guild, Groenendijk and Carrera (eds.), *Illiberal Liberal States: Immigration, Citizenship, and Integration in the EU* (Farnham, Ashgate Publishing, 2009), 414 pp.

Guild, *Immigration law in the European Community* (The Hague, Kluwer Law International, 2001), 370 pp.

Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (The Hague, Kluwer Law International, 2004), 265 pp.

Hailbronner and Renner, *Staatsangehörigkeitsrecht* (München, Beck, 2005), 1447 pp.

Hall, *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995), 214 pp.

Handoll, *Free Movement of Persons in the EU* (Chichester, John Wiley & Sons, 1995), 726 pp.

Hartley, *EEC Immigration Law* (Amsterdam, North-Holland, 1978), 335 pp.

Hjalte Rasmussen (ed.), *Greenland in the Process of Leaving the European Communities* (Copenhagen, Forlaget Europa, 1983), 95 pp.

Jackson, Leopold and Phillips, *Constitutional and Administrative Law* (8th ed.) (London, Sweet and Maxwell, 2001), 855 pp.

Jans, de Lange, Prechal and Widdershoven, *Europeanisation of Public Law* (Groningen, Europa Law

Publishing, 2007), 418 pp.

Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 492 pp.

Koens, Blankman and Driessen, *Het hedendaagse personen- en familierecht (behoudens het huwelijksvermogensrecht)* (Zwolle, Tjeenk Willink, 1998), 519 pp.

Kortmann, *Constitutioneel recht* (4th ed.) (Deventer, Kluwer, 2001), 556 pp.

Kotalakidis, *Von der nationalen Staatsangehörigkeit zur Unionsbürgerschaft: die Person und das Gemeinwesen* (Baden-Baden, Nomos, 2000), 342 pp.

Lauterpacht, *International Law and Human Rights* (USA, Archon Books, 1968), 475 pp.

Lenaerts, Arts and Maselis (Bray (ed.)), *Procedural Law of the European Union* (2nd ed.) (London, Sweet & Maxwell, 2006), 790 pp.

Lenaerts and Van Nuffel (Bray and Cambien (eds.)), *European Union Law* (3rd ed.) (London, Sweet & Maxwell, 2011), 1083 pp.

LSE Mackinder Programme, *Another Europe? After the third no* (Dublin, The Lilliput Press, 2008), 170 pp.

Maas, *Creating European Citizens* (Lanham, Rowman & Littlefield, 2007), 171 pp.

Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrecht* (Stuttgart, Kohlhammer, 1962), pp.

Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Oxford and Portland, Hart Publishing, 2000), 268 pp.

Marias (ed.), *European Citizenship* (Maastricht, EIPA, 1994), 276 pp.

Martin and Guild, *Free Movement of Persons in the European Union* (London, Edinburgh, Butterworths, 1996), 416 pp.

Martin and Law (Eds.), *Oxford Dictionary of Law* (6th ed.) (Oxford, Oxford University Press, 2006), 590 pp.

McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge, Cambridge University Press, 2006), 230 pp.

Meeusen, Pertegás, Straetmans and Swennen (eds.), *International Family Law for the European Union* (Antwerp-Oxford-Portland, Intersentia, 2007), 461 pp.

Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford and Portland, Hart Publishing, 2004), 239 pp.

Nackom and Van Hoecke, *Juridisch zakwoordenboek* (2nd ed.) (Leuven, Acco, 2007), 167 pp.

O'Leary, *The Evolving Concept of Community Citizenship: from the Free movement of Persons to Union Citizenship* (London, Kluwer Law International, 1996), 347 pp.

Peers, *EU Justice and Home Affairs Law* (3rd ed.) (Oxford, Oxford University Press, 2011), 1100 pp.

Peers and Rogers, *EU Immigration and Asylum Law: Text and Commentary* (Leiden, Martinus Nijhoff

Publishers, 2006), 1025 pp.

Pollard, Hughes and Parpworth, *Constitutional and Administrative Law: Text and Materials* (4th ed.) (Oxford, Oxford University Press, 2007), 920 pp.

Prakke and Kortmann, *Constitutional Law of 15 EU Member States* (Deventer, Kluwer, 2004), pp.

Rogers and Scannell, *Free Movement of Persons in the Enlarged European Union* (London, Sweet and Maxwell, 2005), 685 pp.

Schermers and Waelbroeck, *Judicial Protection in the European Union* (6th ed.) (The Hague, Kluwer Law International, 2001), pp.

Schönberger, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht* (Tübingen, Mohr Siebeck, 2005), 597 pp.

Sewandono, *Werknemersverkeer en gezinsleven* (Deventer, Kluwer, 1998), 368 pp.

Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge, Cambridge University Press, 2007), 398 pp.

Shaw, *International Law* (6th ed.) (Cambridge, Cambridge University Press, 2008), 1542 pp.

Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context* (Alphen aan den Rijn, Kluwer Law International, 2007), 182 pp.

Spaventa and Dougan, *Social Welfare and EU Law* (Oxford and Portland, Hart Publishing, 2005), 290 pp.

Toner, *Partnership Rights, Free Movement and EU Law* (Oxford and Portland, Hart Publishing, 2004), 286 pp.

Tridimas, *The General Principles of EU Law* (2nd ed.) (Oxford, Oxford University Press, 2006), 591 pp.

Tryfonidou, *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International, 2009), 271 pp.

Van der Mei, *Free Movement of Persons within the European Community: Cross-border Access to Public Benefits* (Oxford and Portland, Hart Publishing, 2003), 528 pp.

van Dijk, Van Hoof, van Rijn and Zwaak, *Theory and Practice of the European Convention on Human Rights* (Antwerp-Oxford-Portland, Intersentia, 2006), 1190 pp.

Van Elsuwege, *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession on to the EU* (Leiden and Boston, Martinus Nijhoff Publishers, 2008), 589 pp.

Van Gerven, *The European Union: a Polity of States and Peoples* (Oxford and Portland, Hart Publishing, 2005), 397 pp.

Van Oers, Ersbøll and Kostakopolou (eds.), *A Redefinition of Belonging? Language and Integration Tests in Europe* (The Hague, Brill Publishers/Martinus Nijhoff Publishers, 2010), 338 pp.

Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (The Hague, Kluwer Law International, 2002), 403 pp.

Walker (ed.), *Sovereignty in Transition* (Oxford and Portland, Hart Publishing, 2003), 556 pp.

Walter, *Reverse Discrimination and Family Reunification* (Nijmegen, Wolf Legal Publishers, 2008), 78 pp.

Weyrauch, Katz and Olsen, *Cases and Materials on Family Law: Legal Concepts and Changing Human Relationships* (Saint Paul, West publishing Co., 1994), pp.

Ziemele, *State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law* (Leiden, Martinus Nijhoff Publishers, 2005), 424 pp.

Book sections

Arena, Nascimbene and Zincone, "Italy", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and loss of nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses* (Amsterdam, Amsterdam University Press, 2006), 329-366.

Arnull, "The Americanization of EU Law Scholarship", in Arnull, Eeckhout and Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford, Oxford University Press, 2008), 415-431.

Besselink, "Integration and Immigration: The Vicissitudes of Dutch *'Inburgering'*", in Guild, Groenendijk and Carrera (eds.), *Illiberal liberal states: immigration, citizenship, and integration in the EU* (Farnham, Ashgate Publishing, 2009), 241-258.

Cambien, "Het vrij verkeer van burgers van de Unie in recente Europese rechtspraak: *rethinking the classics*?", in Foblets, Maes and Vanheule (eds.), *30 jaar Vreemdelingenwet* (Bruges, Die Keure, 2011), 461-503.

Custos, "Implications of the European Integration for the Overseas", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 91-120.

De Groot, "Naar een harmonisatie van het nationaliteitsrecht in Europa?", in X (ed.), *Het plezier van de rechtsvergelijking: opstellen over unificatie en harmonisatie van het recht in Europa* (Deventer, Kluwer, 2003), 65-85.

De Groot, "The Relationship between the Nationality of the Member States of the European Union and European Citizenship", in La Torre (ed.), *European Citizenship: An Institutional Challenge* (The Hague, Kluwer Law International, 1998), 115-147.

de Witte, "European Law as an Academic Discipline: Unity and Fragmentation", in Hancher, Bulterman, McDonnell and Sevenster (eds.), *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot* (Alphen aan den Rijn, Kluwer Law International, 2009), 417-428.

Dougan, "Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?", in Barnard and Odudu (eds.), *The Outer Limits of European Union Law* (Oxford and Portland, Hart Publishing, 2009), 119-165.

Evans and Jessurun d'Oliveira, "Nationality and Citizenship", in Cassese, Clapham and Weiler (eds.), *Human Rights and the European Community: Methods of Protection (Part II)* (Baden-Baden, Nomos Verlagsgesellschaft, 1991), 299-345.

Everson, "The Legacy of the Market Citizen", in Shaw and More (eds.), *New Legal Dynamics of European Union* (Oxford, Clarendon, 1995), 73-89.

Fagerlund, "Autonomous European Island regions Enjoying a Special Relationship with the European Union", in Lyck (ed.), *Constitutional and Economic Space of the small Nordic Jurisdictions: The Aaland Islands, the Faroe Islands, Greenland, Iceland* (Stockholm, Nordiska Institutet för Regionalpolitisk Forskning, 1997), 90-121.

Goodwin, "Learning Lessons From Romani National Claims: Taking European Citizenship From an Imaginary Community to an Imagined One?", in Ott and Vos (eds.), *Fifty Years of European Integration* (The Hague, T.M.C. Asser Press, 2009), 309-329.

Hailbronner, "Germany", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses* (Amsterdam, Amsterdam University Press, 2006), 213-251.

Hailbronner, " Nationality in Public International Law and European Law", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 1: Comparative Analyses* (Amsterdam, Amsterdam University Press, 2006), 35-104.

Handoll, "Ireland", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries. Volume 2: Country Analyses* (Amsterdam, Amsterdam University Press, 2006), 289-328.

Hansen, "From Subjects to Citizens: Immigration and Nationality Law in the United Kingdom", in Hansen and Weil (eds.), *Towards a European Nationality: Citizenship, Immigration and Nationality Law in the EU* (Basingstoke, Palgrave, 2001), 69-94.

Hansen and Weil, "Introduction: Citizenship, Immigration and Nationality: Towards a Convergence in Europe?", in *Towards a European Nationality: Citizenship, Immigration and Nationality Law in the EU* (Basingstoke, Palgrave, 2001).

Humphrey, "The Universal Declaration of Human Rights: its History, Impact and Juridical Character", in Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration* (The Hague, Martinus Nijhoff Publishers, 1979), 21.

Iglesias Buhigues, "Doble nacionalidad y derecho comunitario. A propósito del asunto C 369/90, Micheletti, sentencia del TJCE de 7 de Julio de 1992", in Perez Gonzalez and others (eds.), *Hacia un nuevo orden internacional y europeo. Homenaje al profesor M. Diéz de Velasco*

(Madrid, Tecnos, 1993), 953-967.

Jessurun d'Oliveira, "European Citizenship: Its Meaning, Its Potential", in Monar, Ungerer and Wessels (eds.), *The Maastricht Treaty on European Union* (Brussels, European University Press, 1993), 81.

Jessurun d'Oliveira, "Is Reverse Discrimination Still Permissible Under the Single European Act?", in De Boer (ed.), *Forty Years On: The Evolution of Postwar Private International Law in Europe* (Deventer, Kluwer, 1990), 71-86.

Jessurun d'Oliveira, "Nationality and the European Union after Amsterdam", in O'Keeffe and Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford and Portland, Hart Publishing, 1999), 395-412.

Kadelbach, "Union Citizenship", in Bogdandy and Bast (eds.), *Principles of European Constitutional Law* (2nd ed.) (Oxford and Portland/München, Hart Publishing/Beck, 2010), 443-478.

Kochenov, "The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 3-67.

Kochenov, "EU Citizenship in the Overseas", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 199-220.

Kostakopoulou, "The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions", in de Witte and Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (2011), 461-503.

Kostakopoulou, "European Union Citizenship: the Journey goes on ", in Ott and Vos (eds.), *Fifty Years of European Integration* (The Hague, T.M.C. Asser Press, 2009), 271-290.

Kraan, "The Kingdom of the Netherlands", in Prakke and Kortmann (eds.), *Constitutional law of 15 EU member states* (Deventer, Kluwer, 2004), 589-650.

Lawson, "The Impact of the EU Constitution on the Relationship between Strasbourg and Luxembourg", in Curtin, Kellerman and Blockmans (eds.), *The EU Constitution: The best Way Forward?* (The Hague, Asser Press, 2005), 377-395.

Lenaerts, "Union Citizenship and the Principle of Non-discrimination on Grounds of Nationality", in *Festskrift til Claus Gulmann - Liber Amicorum* (Copenhagen, Thomson, 2006), 290-309.

Lenaerts and Cambien, "The Democratic Legitimacy of the EU after the Treaty of Lisbon", in Wouters, Verhey and Kiiver (eds.), *European Constitutionalism beyond Lisbon* (Antwerp-Oxford-Portland, Intersentia, 2009), 185-207.

Lenaerts and Gutiérrez-Fons, "The Role of General Principles of EU Law", in Arnull, Barnard, Dougan and Spaventa (eds.), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Oxford and Portland, Hart Publishing, 2011), 179-197.

Lenaerts and Heremans, "Contouren van een Europese Sociale Unie in de rechtspraak van het Hof van Justitie", in Pieters, Put, Schoukens, Simoens and Stevens (eds.), *Sociale Zekerheden in Vraagvorm - Liber Amicorum Prof. dr. Jef Van Langendonck* (Schoten, Intersentia, 2005).

Mancini, "The Free Movement of Workers in the Case-Law of the European Court of Justice", in Curtin and O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law* (London, Butterworths, 1992), 67.

Marias, "From Market Citizen to Union Citizen", in Marias (ed.), *European Citizenship* (Maastricht, EIPA, 1994), 1-24.

Martenczuk, "Visa Policy and EU External Relations", in Martenczuk and van Thiel (eds.), *Justice, Liberty, Security: New Challenges for EU External Relations* (Brussels, VUB Press, 2008), 21.

Martin, "De Martinez Sala à Bidar, les paradoxes de la jurisprudence sur la libre circulation des citoyens", in Carlier and Guild (eds.), *L'Avenir de la libre circulation des personnes dans l'UE* (Brussels, Bruylant, 2006), 159-179.

Mehdi, "La Citoyenneté européenne", in Tesoka and Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité* (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 35-47.

More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?", in Craig and de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), 517-553.

Mulders, "Translation at the Court of Justice of the European Communities", in Prechal and van Roermund (eds.), *The Coherence of EU Law The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press, 2008), 45-59.

Nic Shuibhne, "The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?", in Beaumont, Lyons and Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford and Portland, Hart Publishing, 2002), 177-196.

Nic Shuibhne, "The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?", in Barnard and Odudu (eds.), *The Outer Limits of European Union Law* (Oxford and Portland, Hart Publishing, 2009), 167-195.

Omarjee, "Les statuts constitutionnels des ressortissants des outre-mers", in Tesoka and Ziller (eds.), *Union européenne et outre-mers: Unis dans leur diversité* (Aix-en-Provence, Presses Universitaires d'Aix-Marselle, 2008), 49-73.

Omarjee, "Specific Measures for the Outermost Regions after the Entry into Force of the Lisbon Treaty", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 121-136.

Poiares Maduro, "The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations", in Kilpatrick, Novitz and Skidmore (eds.), *The Future of Remedies in*

Europe (Oxford and Portland, Hart Publishing, 2000), 117-140.

Ross, "The Struggle for EU Citizenship: Why Solidarity Matters", in Arnull, Barnard, Dougan and Spaventa (eds.), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Oxford and Portland, Hart Publishing, 2011), 283-300.

Sharpston, "Citizenship of the Union", in Moser and Sawyer (eds.), *Making Community Law: the Legacy of Advocate General Jacobs at the European Court of Justice* (Cheltenham, Edward Elgar, 2008), 167-183.

Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in Craig and De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011), 575-609.

Snell, "And Then There Were Two: Products and Citizens in Community Law", in Tridimas and Nebbia (eds.), *European Union Law for the Twenty-First Century: Volume II* (Oxford and Portland, Hart Publishing, 2004), 49-72.

Spielmann, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementaries", in Alston, Bustelo and Heenan (eds.), *The EU and Human Rights* (Oxford, Oxford University Press, 1999), 757-780.

Steenbeek and Gilhuis, "The Kingdom of Denmark", in Prakke and Kortmann (eds.), *Constitutional Law of 15 EU Member States* (Deventer, Kluwer, 2004), 133-180.

Toner, "Accession, Transitional Arrangements and EU Social Citizenship in the UK - a Failure of Legal Protection?", in Ott and Vos (eds.), *Fifty Years of European Integration* (The Hague, T.M.C. Asser Press, 2009), 291-308.

Urbano De Sousa, "Le droit des membres de la famille du citoyen de l'union européenne de circuler et de séjourner sur le territoire des états membres, dans la directive 2004/38/CE", in Carlier and Guild (eds.), *L'avenir de la libre-circulation des personnes dans l'U.E.* (Brussels, Bruylant, 2006).

Van Nuffel and Cambien, "Schoolgeld, Studiebeurzen, Sociale bijstand: de groeiende betekenis van Europees Recht in niet-economische domeinen", in Lenaerts and Wouters (eds.), *Internationaal en Europees recht (Themis School voor postacademische juridische vorming)* (Bruges, Die Keure, 2008), 77-98.

Verhoeven, "Democratic Life in the European Union, according to its Constitution", in Curtin and Wessel (eds.), *Good governance in the European Union. Reflections on Concepts, Institutions and Substance* (Antwerp-Oxford-Portland, Intersentia, 2005), 153-172.

Verschueren, "De nieuwe vreemdelingenwet: België in lijn met de Europese regelgeving", in Foblets, Lust, Vanheule and De Bruycker (eds.), (Bruges, Die Keure, 2007), 161-251.

Verschueren, "Social Federalism and EU Law on the Free Movement of Persons", in Cantillon, Popelier and Mussche (eds.), *Social Federalism: The Creation of a Layered Welfare State. The Belgian case* (Antwerp-Oxford-Portland, Intersentia, 2011), 197-226.

Waelbroeck, "La notion d'abus de droit dans l'ordere juridique communautaire", in *Mélanges en hommage à Jean-Victor Louis* vol. I (Brussels, Éditions de l'Université de Bruxelles, 2003), 595-616.

Waldrauch, "Methodology for Comparing Acquisition and Loss of Nationality", in Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality (Volume 1: Comparative Analyses)* (Amsterdam, Amsterdam University Press, 2006), 105-119.

Weiler, "Citizenship and Human Rights", in Winter et al. (ed.), *Reforming the Treaty on European Union: the Legal Debate* (The Hague, Kluwer Law International, 1996), 57-77.

Ziller, "Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories", in De Búrca and Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?* (Oxford and Portland, Hart Publishing, 2000), 113-131.

Ziller, "Outermost Regions, Overseas Countries and Territories Others after the Entry into Force of the Lisbon Treaty", in Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn, Kluwer Law International, 2011), 69-88.

Electronic articles

Balfour, "The Application of the European Convention on Human Rights by the European Court of Justice" (2005) *Harvard Law School Student Scholarship Series, available at* http://lsr.nellco.org/

Besselink, "Inburgering, gelijke behandeling en verblijfsrecht van vreemdelingen in Nederland " (2004)*, available at* http://www.libertysecurity.org/IMG/pdf/Inburgering_voorstudie.pdf

Besselink, "Expulsion and Integration: Erecting Internal Borders Within the Kingdom of the Netherlands" (2006)*, available at* http://www.libertysecurity.org/article1096.html

Carrera (ed.), "The Nexus Between Immigration, Integration and Citizenship in the EU" (2006)*, available at* www.ceps.be

Carrera and Merlino, "CEPS Special Report : State of the Art on the European Court of Justice and Enacting Citizenship "*, available at* www.ceps.be

Davies, "The Entirely Conventional Supremacy of Union Citizenship and Rights" (2010) *EUDO Citizenship Forum, available at* http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2

De Groot, "Towards a European Nationality Law" (2004) 8.3 *EJCL, available at* http://www.ejcl.org/83/art83-4.PDF

de Witte, "European Union Law: A Unified Academic Discipline?" (2008) *EUI Working Paper RSCAS 2008/34, available at* http://cadmus.eui.eu/handle/1814/10028

Dormoy, "Association des pays et territoires d'outre-mer (PTOM) à la communauté européenne" (Paris, Editions du Juris-Classeur) fasc. 473 *Juris-Classeur Europe, available at* www.lexisnexis.com

Dyrendom Graugaard, "National Identity in Greenland in the Age of Self-Government " (2009) *Centre for the Study of Global Power & Politics Working Paper 09/5 available at* http://www.trentuniversity.ca/globalpolitics/documents/Graugaard095.pdf

Favell, "European Citizenship in Three Eurocities" (2005) *Archive of European Integration, University of Pittsburgh, available at* http://aei.pitt.edu/3096/

Honohan, "Ius Soli Citizenship" (2010) *EUDO CITIZENSHIP Policy Brief No. 1, available at* http://eudo-citizenship.eu/policy-briefs

Jouen and Chambon, "L'identité européenne dans les textes et les politiques communautaires", *available at* www.notre-europe.eu

Kochenov, "Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship" (2010) *EUI RSCAS Paper 2010/23, available at* http://cadmus.eui.eu/dspace/bitstream/1814/13634/1/RSCAS_2010_23.pdf

Kochenov, "Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters" (2010)*, available at* http://ssrn.com/abstract=1593220

Kostakopoulou, "European Union Citizenship and Member State Nationality: Updating or Upgrading the Link?" (2010) *EUDO Citizenship Forum, available at* http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=5

Kruma, "Country Report: Latvia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Latvia

Margiotta and Vonk, "Nationality Law and European Citizenship: the Role of Dual Nationality" (2010) *EUDO Citizenship Working Paper, available at* http://eudo-citizenship.eu/docs/RSCAS%202010_66.pdf

O'Leary, "Developing an Ever Closer Union Between the Peoples of Europe?" (2008) *Edinburgh Mitchell Working Paper 6/2008, available at* www.law.ed.ac.uk

Poleshchuk and Järve, "Country Report: Estonia" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/country-profiles/?country=Estonia

Robinson, "Address to a Joint Sitting of the Houses of the Oireachtas (Irish Parliament) (2 February, 1995)", *available at* http://oireachtas.ie/viewdoc.asp?fn=/documents/addresses/2Feb1995.htm

Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies" (2006) 10 *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop

Rubio Marìn and Sobrino, "Country Report: Spain" (2010) *EUDO Citizenship Observatory, available*

at http://eudo-citizenship.eu/docs/CountryReports/Spain.pdf

Sawyer, "Country Report: United Kingdom" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/United%20Kingdom.pdf

Schultz, "Polynésie, Wallis et Futuna, Terres Australes et Antarctiques françaises" (Paris, Editions du Juris-Classeur) Fasc. 132*, available at* www.lexisnexis.com

Streeck, "Citizenship Under Regime Competition: The Case of the 'European Works Councils'" (1997) *European Integration Online Papers, available at* http://eiop.or.at/eiop/index.php/eiop

Sutton, "Jersey's Changing Constitutional Relationship With Europe" (2005) *The Jersey Law Review, available at* http://www.jerseylaw.je/Publications/jerseylawreview/contents05.aspx

Toner, "Community Law Immigration Rights, Unmarried Partnerships and the Relationship Between European Court of Human Rights Jurisprudence and Community Law in the Court of Justice" (2001) 5 *Web Journal of Current Legal Issues, available at* http://webjcli.ncl.ac.uk/2001/issue5/toner5.html

Van Oers, De Hart and Groenendijk, "Country Report: The Netherlands" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/Netherlands.pdf

Vucheva, "EU States Not Applying Free Movement Rules, Brussels Says " (2008) *EUobserver, available at* http://euobserver.com/9/27279

Wandall, "Researching Danish Law" (2006) *NYU Hauser Global Law School Program, available at* http://www.nyulawglobal.org/globalex/Denmark.htm

Weil, Spire and Bertossi, "Country Report: France" (2010) *EUDO Citizenship Observatory, available at* http://eudo-citizenship.eu/docs/CountryReports/France.pdf

X., "Het begrip “ten laste zijn” in het kader van gezinshereniging"*, available at* http://www.vmc.be/vreemdelingenrecht/wegwijs.aspx

Ziller, "Champ d'application du droit communautaire" (Paris, Editions du Juris-Classeur) fasc. 470 *Juris-Classeur Europe, available at* www.lexisnexis.com

Journal articles

Am Ende, "But not the Walloons! Internal quarrel - or a Case for the Court?", (2008) *European Law Reporter,* 114-117.

Baraldi, "EU Family Policies Between Domestic ‘Good Old Values’ and Fundamental Rights: the Case of Same-Sex Families", (2008) 15 *MJ,* 517-551.

Barber, "Citizenship, Nationalism and the European Union", (2002) 27 *E.L. Rev.,* 241-259.

Barnard, "Case C-209/03, R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills", (2005) 42 *CML Rev.,* 1465-1489.

Barrett, "Family Matters: European Community law and Third-country Family Members", (2003) 40 *CML Rev.,* 369-421.

Bauböck, "Why European Citizenship? Normative Approaches to Supranational Union", (2007) *Theoretical Inquiries in Law,* 452-488.

Bennhold, "Quietly Sprouting: A European Identity", (2005) *New York Times,* 27 April 2005.

Besselink, "Case C-145/04, *Spain v United Kingdom*, judgment of the Grand Chamber of 12 September 2006; Case C-300/04, *Eman and Sevinger*, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 September 2007, Applications Nos. 17173/07 and 17180/07, *Oslin Benito Sevinger and Michiel Godfried Eman* v. *the Netherlands* (*Sevinger and Eman*)"", (2008) 45 *CML Rev.,* 787-813.

Besselink, "Nederlands postkoloniaal kiesrecht: het Europees Parlement en de Tweede Kamer", (2007) *N.T.E.R.,* 64-71.

Besson and Utzinger, "Introduction: Future Challenges of European Citizenship - Facing a Wide-Open Pandora's Box", (2007) 13 *E.L.J.,* 573-590.

Bierbach, "European Citizens' Third-Country Family Members and Community Law", (2008) 4 *EuConst,* 344-362.

Bleckmann, "German Nationality Within the Meaning of the EEC Treaty", (1978) 15 *CML Rev.,* 435-446.

Bleckmann, "The Personal Jurisdiction of the European Community", (1980) 17 *CML Rev.,* 467-485.

Brownlie, "The Place of the Individual in International Law ", (1964) 50 *Va. L. Rev.,* 435-462.

Cambien, "Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform", (2009) 15 *Colum. J. Eur. L.,* 321-341.

Cambien, "Case C-135/08, Janko Rottman v Freistaat Bayern", (2011) 17 *Colum. J. Eur. L.,* 375-394.

Cambien, "Case Note: Case C-73/08, Nicolas Bressol and Others v Gouvernement de la Communauté française", (2010) *SEW,* 423-426.

Cambien, "Case Note: Case C-135/08 Janko Rottmann/Freistaat Bayern", (2010) *SEW,* 379-382.

Cambien, "Case Note: Case C-310/08, London Borough of Harrow v Nimco Hassan", (2010) *SEW,* 416-419.

Cambien, "Mogen statische Unieburgers worden gediscrimineerd? Enkele beschouwingen bij *Ruiz Zambrano* en *McCarthy*", (2011) *T.Vreemd,* 241-252.

Cambien, "Student Mobility in the European Union: Facing New Hurdles?", (2009) 11 *Revista Universitaria Europea,* 77-99.

Cambien and Roes, "Het Verdrag van Lissabon: *anywhere as long as it's forward*?", (2010) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht,* 195-206.

Candela Soriano and Cheneviere, "Droit au regroupement familial et droit au mariage du citoyen de l'Union européenne et des membres de sa famille à la lumière de la directive 2004/38/CE", (2005) *Revue trimestrielle des droits de l'homme,* 923-953.

Cannizzaro, "Producing 'Reverse Discrimination' through the Exercise of EC Competences", (1997) *YbEL,* 29-46.

Carlier, "Case C-200/02, Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department", (2005) 42 *CML Rev.,* 1121-1131.

Carlier, "Le devenir de la libre circulation des personnes dans l'Union européenne: regard sur la directive 2004/38", (2006) *C.D.E.,* 13-34.

Carrera and Wiesbrock, "Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU", (2010) 12 *Eur. J. Migration & L.,* 337-359.

Chalmers, "The secret delivery of justice (editorial)", (2008) 33 *E.L. Rev.,* 773-774.

Chalmers, "The Unbearable Heaviness of European Citizenship (editorial)", (2006) 31 *E.L. Rev.,* 779-780.

Chan, "The Right to Nationality as a Human Right: the Current Trend Towards Recognition", (1991) 12 *HRLJ,* 1-14.

Christiansen and Vaccari, "The 2006 Reform of Comitology: Problem Solved or Dispute Postponed?", (2006) *EIPASCOPE,* 9-17.

Claes, "Zaak C-300/04, M.G. Eman en O.B. Sevinger t. College van burgemeester en wethouders van Den Haag en Zaak C-145/04 Koninkrijk Spanje t. Verenigd Koninkrijk van Groot-Brittanië en Noord-Ierland", (2007) *SEW,* 216-221.

Cloots, "Germs of Pluralist Judicial Adjudication: *Advocaten voor de Wereld* and Other References from the Belgian Constitutional Court ", (2010) *CML Rev.,* 645-672.

Closa, "Citizenship of the Union and Nationality of Member States", (1995) 32 *CML Rev.,* 487-518.

Costello, "Metock: Free Movement and 'Normal Family Life' in the Union", (2009) 46 *CML Rev.,* 587-622.

Craig, "The ECJ and Ultra Vires Action: A Conceptual Analysis", (2011) 48 *CML Rev.,* 395-437.

Currie, "Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock", (2009) 34 *E.L. Rev.,* 310-326.

Currie, "EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law", (2009) *Journal of Social Security Law,* 76-105.

Curtin, "The Constitutional Structure of the Union: a Europe of Bits and Pieces", (1993) 30 *CML Rev.,* 17-69.

Curtin and van Ooik, "De bijzondere positie van Denemarken in de Europese Unie", (1993) *SEW,* 675-689.

Dashwood, "The Limits of European Community Powers", (1996) 21 *E.L. Rev.,* 113-128.

Dautricourt and Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?", (2009) 34 *E.L. Rev.,* 433-454.

Davies, "'Any Place I Hang My Hat?' or: Residence is the New Nationality", (2005) 11 *E.L.J.,* 43-56.

Davis, "Citizenship of the Union…Rights for All", (2002) 27 *E.L. Rev.,* 121-137.

Dawes, ""Royaume d'Espagne c. Royaume-Uni de Grande-Bretagne et d'Irlande du Nord" et "Eman et Sevinger c. College van burgmeester en wethouders van Den Haag"", (2006) 3 *R.D.U.E,* 707-712.

De Groot, "The European Convention on Nationality: A Step Towards a Ius Commune in the Field of Nationality Law", (2000) 7 *MJ,* 117-157.

De Groot, "Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europees Hof van Justitie", (2010) *Asiel & Migratierecht,* 293-300.

De Groot, "Latin-American European Citizens: Some Consequences of the Autonomy of the Member States of the European Union in Nationality Matters (editorial)", (2002) 9 *MJ,* 115-120.

De Groot, "Negeert Spanje de Micheletti-beslissing van het Europees Hof van Justitie?", (1998) *Migrantenrecht,* 123-124.

De Groot, "Visumplicht Antillianen/Arubanen en het Europese burgerschap", (2000) *Migrantenrecht,* 51-52.

De Groot and Selling, "The Consequences of the Rottmann Judgment on Member State Autonomy - The European Court of Justice's Avant-Gardism in Nationality Matters", (2011) 7 *EuConst,* 150-160.

De Groot and Mijts, "De onwenselijkheid van een dubbele taaltoets voor naturalisandi in Aruba en de Nederlandse Antillen", (2009) *Migrantenrecht,* 366-371.

de Hart, "Love Thy Neighbour: Family Reunification and the Rights of Insiders", (2009) 11 *Eur. J. Migration & L.,* 235-252.

de Hart, "The Marriage of Convenience in European Immigration Law", (2006) 8 *Eur. J. Migration & L.,* 251-262.

de Waele, "EU Citizenship: Revisting its Meaning, Place and Potential", (2010) 12 *Eur. J. Migration & L.,* 319-336.

de Witte, "The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law", (2009) 13 *Citizenship Studies,* 515-525.

Delors, "Déclaration sur les orientations de la Commission des Communautés européennes", (1989) *Bulletin des Communautés européennes (Supplément 1/89),* 5-21.

Denys, "Note to Belgian Constitutional Court, Case 174/2009", (2010) *T.Vreemd,* 47-49.

Dollat, "La citoyenneté française: une superposition de citoyennetés", (2005) *RFDA,* 69-85.

Dougan, "The Constitutional Dimension to the Case Law on Union Citizenship", (2006) 31 *E.L. Rev.,* 613-641.

Dougan, "Cross-border Educational Mobility and the Exportation of Student Financial Assistance (Case Comment)", (2008) 33 *E.L. Rev.,* 723-738.

Dougan, "Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU?", (2005) 42 *CML Rev.,* 943-986.

Dougan and Spaventa, "Educating Rudy and the (non-)English Patient: A Double-Bill on Residency Rights under Article 18 EC", (2003) 28 *E.L. Rev.,* 699-712.

Editorial, "Three Paradoxes of EU Citizenship", (2010) 35 *E.L. Rev.,* 129-130.

Edward, "How the Court of Justice Works", (1995) 20 *E.L. Rev.,* 539-558.

Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question", (2002) 39 *CML Rev.,* 945-994.

Elsmore and Starup, "Case C-1/05, Yunying Jia v. Migrationsverket, Judgment of the Court (Grand Chamber), 9 January 2007", (2007) 44 *CML Rev.,* 787-801.

Elsmore and Starup, "Union Citizenship -- Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy", (2008) 26 *YbEL,* 57-114.

Epiney, "The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship", (2007) 13 *E.L.J.,* 611-622.

Evans, "Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Natonality Act 1981", (1982) *YbEL,* 173-189.

Evans, "Nationality Law and European Integration", (1991) 16 *E.L. Rev.,* 190-215.

Fahey, "Going Back to the Basics: Re-embracing the Fundamentals of the Free Movement of Persons in Metock", (2009) 36 *LIEI,* 83-89.

Fallon, "Les droits accessoires à l'excercice des droits économiques de la Communauté", (1993) *Ann.dr.Louvain,* 235-253.

Farahat, "The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants", (2009) 11 *Eur. J. Migration & L.,* 253-269.

Fernandes, "The 'Chen' Case (Case Comment)", (2007) 21 *Journal of Immigration, Asylum and Nationality Law,* 245-246.

Finnis, "Nationality, Alienage and Constitutional Principle", (2008) *University of Oxford Faculty of Law Legal Studies Research paper Series Working Paper No. 08/2008*.

Foblets and Loones, "Het Wetboek van de Belgische nationaliteit andermaal herzien (2006): het parlement ontzien of gezien?" (2007) *T.Vreemd.*, 23-39.

Foblets and Vanheule, "Het federale vreemdelingenbeleid in België: enkele recente wetswijzigingen" (2007) *TBP*, 387-408.

Fukuyama, "Identity, Immigration, and Liberal Democracy", (2006) 17 *J. Democracy,* 5-20.

Gautron, "Le statut communautaire des DOM et des PTOM", (2006) *R.A.E.-L.A.E.,* 385-394.

Gelazis, "The European Union and the Statelessness Problem in the Baltic States", (2004) 6 *Eur. J. Migration & L.,* 225-242.

Gilbert, "National Identity and Immigration Policy in the U.S. and the European Union", (2008) 14 *Colum. J. Eur. L.,* 99-144.

Glazer, "Affaire Nottebohm (Liechtenstein v. Guatemala)--A Critique", (1955-1956) 44 *Geo. L.J.,* 314-325.

Gohin, "La citoyennete dans l'outre-mer français", (2002) *R.F.D.A.P.,* 69-82.

Goldner, "Family Reunification of European Community Nationals", (2005) *Croatian Yearbook of European Law & Policy,* 163-202.

Golynker, "Jobseekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity", (2005) 30 *E.L. Rev.,* 111-122.

Golynker, "Student Loans: The European Concept of Social Justice according to Bidar", (2006) 31 *E.L. Rev.,* 390-401.

Greaves, "Who is a Dependent Member of a Worker's Family?", (1988) 13 *E.L. Rev.,* 270-275.

Greenwood, "Nationality and the Limits of the Free Movement of Persons in Community Law", (1987) *YbEL,* 185-210.

Groenendijk, "Reinstatement of Controls at the Internal Borders of Europe; Why and Against Whom?", (2004) 10 *E.L.J.,* 150-170.

Groenendijk, "Family Reunification as a Right under Community Law", (2006) 8 *Eur. J. Migration & L.,* 215-230.

Grossman, "Birthright Citizenship as Nationality of Convenience", *Proceedings, Council of Europe, Third Conference on Nationality, Strasbourg, 11-12 Oct. 2004,* 109-121.

Guliyeva, "Lost in Transition: Russian-speaking Non-citizens in Latvia and the Protection of Minority Rights in the European Union", (2008) 33 *E.L. Rev.,* 843-869.

Habermas, "Citizenship and National Identity: Some Reflections of the Future of Europe", (1992) 12 *Praxis International,* 1-19.

Hailbronner and Thym, "Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011", (2011) 48 *CML Rev.,* 1253-1270.

Hailbronner, "Deutsche Staatsangehörigkeit und DDR-Staatsbürgerschaft", (1981) *JuS,* 712-718.

Hailbronner, "Union citizenship and Access to Social Benefits", (2005) 42 *CML Rev.,* 1245-1267.

Hall, "Determining the Scope ratione personae of European Citizenship: Customary International Law Prevails for Now", (2001) 28 *LIEI,* 355-360.

Hall, "The European Convention on Nationality and the Right to Have Rights", (1999) 24 *E.L. Rev.,* 586-602.

Hall, "Loss of Union Citizenship in Breach of Fundamental Rights", (1996) 21 *E.L. Rev.,* 129-143.

Hanf, "'Reverse Discrimination in EU Law': Constitutional Aberration, Constitutional Necessity, or Judicial Choice?", (2011) 18 *MJ,* 29-61.

Harhoff, "Greenland's Withdrawal From the European Communities", (1983) 20 *CML Rev.,* 13-33.

Harrington, "Citizenship and the Biopolitics of Post-nationalist Ireland", (2005) 32 *Journal of Law and Society,* 424-449.

Hervouët, "CJCE, 12 septembre 2006, Royaume d'Espagne/Royaume-Uni de Grande-Bretagne et d'Irlande du Nord - CJCE, 12 septembre 2006, Eman et Sevinger/College van burgmeester en wethouders van Den Haag ", (2006) *R.A.E.-L.A.E.,* 565-570.

Himes, "Constitutional Law - You Can't Take It With You: the Constitutionality of Workers' Compensation Rules Based on Residency", (2005) 27 *W. New Eng. L. Rev.,* 261-298.

Hofstotter, "A Cascade of Rights, or Who Shall Care For Little Catherine? Some Reflections on the Chen Case", (2005) 30 *E.L. Rev.,* 548-558.

Icard, "La primauté de l'usage du droit à circuler sur la qualité de citoyen européen", (2008) *Recueil Dalloz,* 1655-1659.

Iliopoulou and Toner, "A New Approach to Discrimination Against Free Movers", (2003) 28 *E.L. Rev.,* 389-397.

Iliopoulou, "Le nouveau droit de séjour des citoyens de l'Union et des membres de leur famille: la directive 2004/38/CE", (2004) *R.D.U.E,* 523-557.

Jacobs, "Citizenship of the European Union - A Legal Analysis", (2007) 13 *E.L.J.,* 591-610.

Jans, "Proportionality Revisited", (2000) 27 *LIEI,* 239-265.

Jensen, "The Position of Greenland and the Faroe Islands Within the Danish Realm", (2003) 9 *E.P.L.,* 170-178.

Jessurun d'Oliveira, "Case C-369/90 *Micheletti and others*", (1993) 30 *CML Rev.,* 623-637.

Jessurun d'Oliveira, "Decoupling Nationality and Union Citizenship?", (2011) 7 *EuConst,* 138-149.

Jessurun d'Oliveira, "Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de *Rottmann* zaak", (2010) *NJB,* 1028-1033.

Jessurun d'Oliveira, "TweederangsNederlanders: de Antillianen", (2006) *Migrantenrecht,* 88-99.

Jessurun d'Oliveira, "Workers and Other Persons: Step-by-step from Movement to Citizenship – Case Law 1995-2001", (2002) 39 *CML Rev.,* 77-127.

Johnson, "Hong Kong after 1997: a Free City?", (1997) 40 *German Yearbook of International Law,* 383-404.

Jones, "The Nottebohm Case", (1956) 5 *Int'l & Comp. L.Q.,* 230-244.

Kavelaars, "The Foreign Countries of the European Union", (2007) 16 *EC Tax Review,* 268-273.

King, "Chen v. Secretary of State: Expanding the Residency Rights of Non-nationals in the European Community", (2007) 29 *Loy. L.A. Int'l & Comp. L. Rev.,* 291-307.

Kochenov, "Case C-135/08 *Janko Rottmann* v. *Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported", (2010) 47 *CML Rev.,* 1831-1846.

Kochenov, "Double nationality in the EU: An Argument for Tolerance", (2011) 17 *E.L.J.,* 323-343.

Kochenov, "EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic", (2007) 3 *Journal of Contemporary European Research,* 124-140.

Kochenov, "The Impact of European Citizenship on the Association of the Overseas Countries and

Territories With the European Community", (2009) 36 *LIEI,* 239-256.

Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights", (2009) 15 *Colum. J. Eur. L.,* 169-237.

Kochenov, "Pre-accession, Naturalization, and 'Due Regard to Community Law': the European Union's 'Steering' of Citizenship Policies in Candidate Countries during the Fifth Enlargement", (2004) 4 *Romanian J. Pol. Sci.,* 71-97.

Kochenov, "The Puzzle of Citizenship and Territory in the EU: On European Rights Overseas", (2010) 17 *MJ,* 230-251.

Kochenov, "Regional Citizenships and EU Law: the Case of the Aland Islands and New Caledonia", (2010) 35 *E.L. Rev.,* 307-325.

Kochenov, "Substantive and Procedural issues in the Application of European Law in the Overseas Possessions of European Union Member States", (2008-2009) 17 *Mich. St. J. Int'l L.,* 195-290.

Kochenov, Bröring and Hoogers, "Staatsrechtelijke consequenties van de toekenning van een UPG-status aan Aruba en de Eilandgebieden van de huidige Nederlandse Antillen", (2010) 26 *Tijdschrift voor Antilliaans Recht - Justicia,* 10-24.

Kokott, "EU citizenship - citoyens sans frontières?", (2005) *Durham European Law Institute European Law Lecture,* 1-11.

Konstadinides, "La fraternite europeene? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship", (2010) 35 *E.L. Rev.,* 401-414.

Kostakopoulou, "Nested 'Old' and 'New' citizenships in the European Union: Bringing out the Complexity", (1999) 5 *Colum. J. Eur. L.,* 389-413.

Kovar and Simon, "La citoyenneté européenne", (1993) *C.D.E.,* 285-316.

Krämer, "Greenland's European Community (EC) referendum: Background and consequences", (1982) 25 *German Yearbook of International Law,* 273-289.

Krömer, "Der Ius-Soli-Erwerb der deutschen Staatsangehörigkeit und die Aufgaben des Standesbeamten", (2000) 12 *Das Standesamt,* 363-369.

Kumm, "To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty", (2005) 11 *Colum. J. Eur. L.,* 481-522.

Kunoy, "A Union of National Citizens: the Origins of the Court's Lack of Avant-Gardisme in the Chen Case", (2006) 43 *CML Rev.,* 179-190.

Kunz, "The Nottebohm Judgment", (1960) 54 *Am. J. Int. L.,* 536-571.

Lansbergen, "Metock, Implementation of the Citizens' Rights Directive and Lessons for EU Citizenship", (2009) 31 *Journal of Social Welfare and Family Law,* 285-297.

Lebeck, "The European Court of Human Rights on the Relation Between ECHR and EC-law: the Limits of Constitutionalisation of Public International Law", (2007) 62 *ZöR,* 195-236.

Lenaerts, "Constitutionalism and the Many Faces of Federalism", (1990) 38 *Am. J. Comp. L.,* 205-264.

Lenaerts, "Federalism: Essential Concepts in Evolution - The Case of the European Union", (1998) *Fordham Int'l L.J.,* 746-798.

Lenaerts, "Is de Europese Unie federaal", (1995) *T.B.P.,* 607-618.

Lenaerts and Cambien, "Regions and the European Courts: Giving Shape to the Regional Dimension of Member States", (2010) 35 *E.L. Rev.,* 609-635.

Lenaerts and Gerard, "The Structure of the Union According to the Constitution for Europe: the Emperor is Getting Dressed", (2004) 29 *E.L. Rev.,* 289-322.

Lenaerts and Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU Law", (2010) 47 *CML Rev.,* 1629-1669.

Lenaerts and Heremans, "Contours of a European Social Union in the Case-Law of the European Court of Justice", (2006) 2 *EuConst,* 101-115.

Lenaerts and Van Nuffel, "La constitution pour L'Europe et L'Union comme entité politique et ordre juridique", (2005) *C.D.E.,* 13-125.

Llewellyn, "Citizens Without Statehood: Denying Domicile to Fund Public Higher Education", (2006) 108 *W. Va. L. Rev.,* 775-796.

Lottmann, "No Direction Home: Nationalism and Statelessness in the Baltics", (2008) 43 *Tex. Int'l L.J.,* 503-520.

Luby, "Discrimination en raison de la nationalité", (2006) *J.D.I.C.,* 680-684.

Lundström, "Family Life and the Freedom of Movement of Workers in the European Union", (1996) 10 *Int'l J.L. & Pol'y & Fam.,* 250-280.

Magnette, "How can one be European? Reflections on the Pillars of European Civic Identity", (2007) 13 *E.L.J.,* 664-79.

Majone, "Europe's 'Democratic Deficit': the Question of Standards", (1998) 4 *E.L.J.,* 5-28.

Mancini and Keeling, "Language, Culture and Politics in the Life of the European Court of Justice", (1995) 1 *Colum. J. Eur. L.,* 397-413.

Martin, "Comments on *Förster* (Case C-158/07 of 18 November 2008), *Metock* (Case C-127/08 of 25 July 2008) and *Huber* (Case C-524/06 of 16 December 2008)", (2009) 11 *Eur. J. Migration & L.,* 95-108.

Martin, "Comments on Gouvernement de la Communauté française and Gouvernement wallon (Case C-212/06 of 1 April 2008) and Eind (Case C-291/05 of 11 December 2007)", (2008) 10 *Eur. J. Migration & L.,* 365-379.

Martin, "Droit communautaire et dispositif Schengen: incompatibilité concernant le traitement du conjoint du ressortissant communautaire", (2006) *RTDE,* 568-582.

Mason, "EC Commission Draft Approves Withdrawal of Greenland from the European Community and Proposes Terms for Economic Reassociation", (1983) 13 *Ga. J. Int'l & Comp. L.,* 865-876.

Mather, "The Court of Justice and the Union Citizen", (2005) 11 *E.L.J.,* 722-743.

McAuliffe, "Enlargement at the European Court of Justice: Law, Language and Translation", (2008) 14 *E.L.J.,* 806-818.

Mitsilegas, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", (2006) 43 *CML Rev.,* 1277-1311.

Moravcsik, "In Defense of the Democracy Deficit: Re-assessing the Legitimacy of the European Union", (2002) 39 *JCMS,* 603-624.

Mouton, "Réflexions sur la nature de l'Union européenne à partir de l'arrêt Rottmann", (2010) *Revue Générale de Droit International Public,* 257-280.

Mowbray, "The Creativity of the European Court of Human Rights", (2005) *Hum. Rts. L. Rev.,* 57-79.

Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who belongs'?", (2005) 25 *Legal Stud.,* 578-600.

Murphy, "The Concept of Integration in the Jurisprudence of the European Court of Human Rights", (2010) 12 *Eur. J. Migration & L.,* 23-43.

Newdick, "Citizenship, Free movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity", (2006) 43 *CML Rev.,* 1645-1668.

Ngai, "Birthright Citizenship and the Alien Citizen", (2006) 75 *Fordham L. Rev.,* 2521-2530.

Nic Shuibhne, "Case C-76/05 *Schwarz and Gootjes-Schwarz*, Case C-318/05 *Commission v Germany* and Joined Cases C-11/06 & C-12/06 *Morgan and Bucher*", (2008) 45 *CML Rev.,* 771-786.

Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?", (2002) 39 *CML Rev.,* 731-771.

Nic Shuibhne, "The Resilience of EU Market Citizenship ", (2010) 47 *CML Rev.,* 1597-1628.

O'Brien, "Case C-310/08 London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department, Judgment of the Court (Grand Chamber) of 23 February 2010; Case C-480/08 Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department, Judgment of the Court (Grand Chamber) of 23 February 2010", (2011) 48 *CML Rev.,* 203-225.

O'Brien, "Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's 'Real Link' Case Law and National Solidarity", (2008) 33 *E.L. Rev.,* 643-665.

O'Brien, "Social Blind Spots and Monocular Policy Making: the ECJ's Migrant Worker Model", (2009) 46 *CML Rev.,* 1107-1141

O'Leary, "Equal Treatment and EU Citizens: a new Chapter on Cross-Border Educational Mobility and Access to Student Financial Assistance", (2009) 34 *E.L. Rev.,* 612-627.

O'Leary, "Nationality Law and Community Citizenship: A Tale of Two Uneay Bedfellows", (1992) *YbEL,* 353-384.

O'Leary, "Putting Flesh on the Bones of European Union Citizenship", (1999) 24 *E.L. Rev.,* 68-79.

Oliver, "Electoral Rights under Art. 8b of the Treaty of Rome", (1996) 33 *CML Rev.,* 473-498.

Olivier and Reestman, "No Legal Residence Requirements for the Admission of Family Members with

a Third-country Nationality of Migrated Union Citizens", (2007) 3 *EuConst,* 463-475.

Oosterom-Staples, "Het fundamentele recht op vrij verkeer nader bepaald: het arrest Jipa onder de loep", (2009) *N.T.E.R.,* 12-17.

Oosterom-Staples, "Het internationale recht als beschermengel van de exclusieve bevoegdheden van lidstaten inzake verlies van nationaliteit?", (2010) *N.T.E.R.,* 188-194.

Oosterom-Staples, "Toelating en verblijf van EU-burgers en familieleden volgens de verblijfsrichtlijn (1)", (2007) *Migrantenrecht,* 88-96.

Oosterom-Staples, "Toelating en verblijf van EU-burgers en familieleden volgens de verblijfsrichtlijn (2)", (2007) *Migrantenrecht,* 145-157.

Oosterom-Staples, "Van dingen die maar niet voorbijgaan; toelating van derdelander familieleden van burgers van de Unie en ongewenstverklaring van burgers van de Unie", (2007) *N.T.E.R.,* 191-200.

Oosterom-Staples and Vazquez-Muñoz, "Burgerschap van de Unie", (2004) *SEW,* 494-506.

Ovey, "The Margin of Appreciation and Article 8 of the Convention", (1998) 19 *HRLJ,* 10-12.

Papadopoulou, "Situations purement internes et droit communautaire: un instrument jurisprudentiel à double fonction ou une arme à double tranchant?", (2002) *C.D.E.,* 95-129.

Perju, "Reason and Authority in the European Court of Justice," (2009) 49 *Va. J. Int'l L.*, 307-377.

Picod, "Les libertés de circulation imposées aux collectivités territoriales", (2006) *R.A.E.-L.A.E.,* 433-440.

Poiares Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", (2007) 1 *European Journal of Legal Studies,* 1-21.

Prechal, "Free Movement and Procedural Requirements: Proportionality Reconsidered", (2008) 35 *LIEI,* 201-216.

Reich, "System der subjectiven öffentlichen Rechte' in the Union: A European Constitution for Citizens of Bits and Pieces ", (1995) *Collected Courses of the Academy of European Law,* 157-236.

Reich, "Union Citizenship: Metaphor or Source of Rights?", (2001) 7 *E.L.J.,* 4-23.

Reich and Harbacevica, "Citizenship and Family on trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons", (2003) 40 *CML Rev.,* 615-638.

Ritter, "Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234 ", (2006) 31 *E.L. Rev.,* 690-710.

Robinson, "Constitutional Shifts in Europe and the United States: Learning From Each Other", (1996) 32 *Stan. J. Int'l L.,* 1-11.

Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies", (2007) *Tul. Eur. & Civ. L.F.,* 89-156.

Rubenstein and Adler, "International Citizenship: The Future of Nationality in a Globalised World",

(2000) *Ind. J. Global Legal Stud.,* 519-548.

Ryan, "The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland", (2004) 6 *Eur. J. Migration & L.,* 173-193.

Ryan, "The Common Travel Area between Britain and Ireland", (2001) 64 *M.L.R.,* 855-874.

Sarolea, "Le nouveau visage du droit au regroupement familial après deux années de réforme", (2008) *Revue trimestrielle de droit familial,* 361-387.

Sasse, "The Politics of EU Conditionality: the Norm of Minority Protection During and Beyond EU Accession", (2008) 15 *Journal of European Public Policy,* 842-860.

Satzger and Pohl, "The German Constitutional Court and the European Arrest Warrant: 'Cryptic Signals' from Karlsruhe", (2006) 4 *Journal of International Criminal Justice,* 686-701.

Schärer, "The European Convention on Nationality", (1997) 40 *German Yearbook of International Law,* 438-460.

Scheek, "The Relationship Between the European Courts and Integration through Human Rights", (2005) 65 *ZaöRV,* 837-885.

Schönberger, "European Citizenship as Federal Citizenship. Some Citizenship Lessons of Comparative Federalism", (2007) 19 *ERPL/REDP,* 61-81.

Schoukens, "Europees Burgerschap: toegang tot de gezondheidszorg voor EU-burgers op basis van maatschappelijke dienstverlening", (2006-2007) *T. Gez.,* 11-28.

Schrauwen, "European Union citizenship in the Treaty of Lisbon: any Change at All?", (2008) 15 *MJ,* 55.

Schrauwen, "Verblijfsduur als weerspiegeling van ‘een zekere mate van integratie’: transparantie versus proportionaliteit", (2009) *N.T.E.R.,* 77-83.

Schrauwen, "Zelfstandig verblijfsrecht van schoolgaande kinderen van werknemers en hun verzorgers: ontbreken van bestaansmiddelen niet relevant", (2010) *N.T.E.R.,* 231-237.

Schuck, "Citizenship in Federal Systems", (2000) 48 *Am. J. Comp. L.,* 195-226.

Senden and Tahtah, "Reguleringsintensiteit en regelgevingsinstrumentarium in het Europees Gemeenschapsrecht. Over de relatie tussen wetgeving, soft law en de open methode van coördinatie", (2008) *SEW,* 43-57.

Sewandono, "Het Commissievoorstel tot wijziging van Verordening (EEG) nr. 1612/68: Meer bescherming van familie- en gezinsleven en meer gelijke behandeling", (1999) *SEW,* 284-290.

Shaw, "Citizenship of the Union: Towards Post-National Membership?", (1995) *Collected Courses of the Academy of European Law,* 237-347.

Shaw, "The Interpretation of European Union Citizenship", (1998) *M.L.R.,* 293-317.

Shaw, "The Many Pasts and Futures of Citizenship in the European Union", (1997) 22 *E.L. Rev.,* 554-572.

Shaw, "The Political Representation of Europe's Citizens", (2008) 4 *EuConst,* 162-186

Simmonds, "The British Nationality Act 1981 and the Definition of the Term 'National' for

Community Purposes", (1984) 21 *CML Rev.,* 675-686.

Skalla, "China's One-Child Policy: Illegal Children and the Family Planning Law", (2004) 30 *Brook. J. Int'l L.,* 329.

Snell, "The Notion of Market Access: A Concept or a Slogan?", (2010) 47 *CML Rev.,* 437-472.

Snell, "Who's Got the Power? Free Movement and Allocation of Competences in EC Law", (2003) *YbEL,* 323-351.

Somek, "Solidarity decomposed: being and time in European citizenship", (2007) 32 *E.L. Rev.,* 787-818.

Sørensen, "Abuse of Rights in Community law: A principle of Substance or Merely Rhetoric?", (2006) 43 *CML Rev.,* 423-459.

Spaventa, "From Gebhard to Carpenter: Towards a (non-)economic European Constitution", (2004) 41 *CML Rev.,* 743-773.

Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects", (2008) 45 *CML Rev.,* 13-45.

Spijkerboer, "Structural Instability: Strasbourg Case Law on Children's Family Reunion", (2009) 11 *Eur. J. Migration & L.,* 271-293.

Stalford, "Concepts of Family under EU Law - Lessons from the ECHR", (2002) 16 *Int'l J.L. & Pol'y & Fam.,* 410-434.

Staples, "Een gemiste kans voor het Hof van Justitie?", (2000) *N.T.E.R.,* 1-6.

Staples, "Gezinshereniging naar komend Unie-recht", (2000) *N.T.E.R.,* 77-83.

Staples, "Wie is burger van de Unie?", (2001) *N.T.E.R.,* 109-112.

Starup and Elsmore, "Taking a Logical Step Forward? Comment on Ibrahim and Teixeira", (2010) 35 *E.L. Rev.,* 571-588.

Stein, "Lawyers, Judges and the Making of a Transnational Constitution", (1981) 75 *Am. J. Int. L.,* 1-27.

Steinorth, "Üner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life", (2008) *Hum. Rts. L. Rev.,* 185-196.

Strasser, Kraler, Bonjour and Bilger, "Doing Family. Responses to the Constructions of 'The Migrant Family' Across Europe", (2009) 14 *History of the Family,* 165-176.

Strumia, "Citizenship and Free Movement : European and American Features of a Judicial Formula for Increased Comity", (2006) 12 *Colum. J. Eur. L.,* 713-749.

Tagaras, "Le champ d'application personnel du regroupement familial et de l'égalité de traitement des membres de la famille du travailleur dans le cadre du reglement 1612/68", (1988) *C.D.E.,* 329-341.

Terry, "The Bologna Process and Its Impact in Europe: It's so Much More Than Degree Changes", (2008) 41 *Vand. J. Transnat'l L.,* 107-227.

Thym, "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human

Right to Regularize Illegal Stay?", (2008) 57 *Int'l & Comp. L.Q.,* 87-112.

Toner, "Comments on Mary Carpenter v. Secretary of State, 11 July 2002 (Case C-60/00)", (2003) 5 *Eur. J. Migration & L.,* 163-172.

Toner, "Judicial Interpretation of European Union Citizenship - Consolidation or Transformation", (2000) 7 *MJ,* 158-182.

Triantafyllou, "L'interdiction des abus de droit en tant que principe général du droit communautaire", (2002) *C.D.E.,* 611-632.

Tryfonidou, "C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department: Further Cracks in the 'Great Wall' of the European Union?", (2005) *E.P.L.,* 527-541.

Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach", (2009) 15 *E.L.J.,* 634-653.

Tryfonidou, "The Free Movement of Goods, the Overseas Countries and Territories and the EU's Outermost Regions: Some Problematic Aspects", (2010) 37 *LIEI,* 317-338.

Tryfonidou, "In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?", (2009) 46 *CML Rev.,* 1591-1620.

Tryfonidou, "Jia or 'Carpenter II': The Edge of Reason", (2007) 32 *E.L. Rev.,* 908-918.

Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe", (2008) 35 *LIEI,* 43-67.

Van der Mei, "EU-burgerschap en de reikwijdte van het verbod van discriminatie op grond van nationaliteit", (2009) *N.T.E.R.,* 275-287.

Van der Mei, "Freedom of Movement and Financial Aid for Students: Some Reflections on Grzelczyk and Fahmi and Esmoris-Cerdeiro Pinedo Amoris", (2001) 3 *European Journal of Social Security,* 181-207.

Van der Mei, "Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law", (2002) 19 *Ariz. J. Int'l & Comp. L.,* 803-861.

van der Mei, van den Bogaert and de Groot, "De arresten Ruiz Zambrano en McCarthy - Het Hof van Justitie en het effectieve genot van EU-burgerschapsrechten", (2011) *N.T.E.R.,* 188-199.

van der Steen, "Zuiver interne situaties: geen omwenteling, wel inperking", (2008) *N.T.E.R.,* 301-307.

van Dijk, "Protection of 'Integrated' Aliens Against Expulsion under the European Convention on Human Rights", (1999) 1 *Eur. J. Migration & L.,* 293-312.

Van Elsuwege and Adam, "The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination (Case note: Constitutional Court, Judgment 11/2009 of 21 January 2009)", (2009) 5 *EuConst,* 327-339.

Van Elsuwege and Adam, "Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance flamande", (2008) *C.D.E.,* 655-711.

Van Nuffel and Cambien, "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren", (2009) 57 *SEW,* 144-154.

Van Ooik and Schrauwen, "Zaak C-138/02, Brian Francis Collins t. Secretary of State and Pensions en zaak C-456/02, Michel Trojani t. Openbaar centrum voor maatschappelijk welzijn te Brussel (OCMW)", (2005) *SEW,* 42-46.

Van Ooik and Staples, "Het recht op gezinsvorming en gezinshereniging volgens het Europese Hof van Justitie. Hoeveel ruimte is er nog voor een restrictief immigratiebeleid voor de lidstaten?", (2002) *N.T.E.R.,* 269-276.

van Walsum, "Against All Odds: How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Life", (2009) 11 *Eur. J. Migration & L.,* 295-311.

Vandamme, "Case C-212/06, Government of the French Community and the Walloon Government v. Flemish Government", (2009) 46 *CML Rev.,* 287-300.

Vanvoorden, "Case Zhu and Chen v. Secretary of State for the Home Department", (2005) 11 *Colum. J. Eur. L.,* 305-321.

Vanvoorden, "Stelt het arrest Jia een einde aan de België-route?", (2007) *T.Vreemd,* 72-84.

Venekamp, "Het arrest Metock. Een snel arrest met belangrijke gevolgen", (2009) *N.T.E.R.,* 84-89.

Verschueren, "De nieuwe Europese verblijfsrichtlijn 2004/38 sinds 30 april van toepassing: het Europese burgerschap op kruissnelheid", (2006) 2 *T.Vreemd,* 97-127.

Verschueren, "De regionalisering van de sociale zekerheid in België in het licht van het arrest van het Europese Hof van Justitie inzake de Vlaamse zorgverzekering", (2008) *Belgisch Tijdschrift voor Sociale Zekerheid,* 177-231.

Verschueren, "European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems", (2007) 9 *Eur. J. Migration & L.,* 307-346.

Vonk, "Latijns-Amerikaanse Spanjaarden en het Europees burgerschap", (2006) *Migrantenrecht,* 187-195.

Walleyn, "Gezinshereniging na de grote hervorming", (2008) *T.Vreemd,* 247-265.

Weiler, "The European Union belongs to its Citizens: Three Immodest Proposals", (1997) 22 *E.L. Rev.,* 150-156.

Weiler, "To be a European Citizen- Eros and Civilization", (1997) 4 *Journal of European Public Policy,* 495-519.

Weiss, "Greenland's withdrawal from the European Communities", (1985) 10 *E.L. Rev.,* 173-185.

Westbrook, "One Among Millions: an American Perspective on Citizenship in Large Polities", (1993) *Ann.dr.Louvain,* 333-353.

White, "Free Movement, Equal Treatment, and Citizenship of the Union", (2005) *Int'l & Comp. L.Q.,* 885-905.

White, "Conflicting Competences: Free Movement Rules and Immigration Laws", (2004) 29 *E.L. Rev.,* 385-396.

Wilkinson, "Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union", (1995) 1 *E.P.L.,* 417-437.

Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration", (2011) 17 *E.L.J.,* 1-34.

Woltjer, "Zaak C-1/05, Jia", (2007) *SEW,* 303-306.

Wyatt, "Could a 'Yellow Card' for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity?", (2006) *Croatian Yearbook of European Law & Policy,* 1-17.

Ziller, "The European Union and the Territorial scope of European Territories", (2007) 38 *Vict. U. Wellington L. Rev.,* 51-62.

Ziller, "L'Union Européenne et l'Outre-Mer", (2005) 113 *Pouvoirs,* 145-158.

Ziller, "L'association des pays et territoires d'outre-mer à la communauté européenne", (2002) *RFAP,* 127-136.

Zimmermann, "Europäisches Gemeinschaftsrecht und Staatsangehörigkeit der Mitgliedstaaten unter besonderer Berücksichtigung der Probleme mehrfacher Staatsangehörigkeit", (1995) *EuR.,* 54-70.